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A GENERATION OF JUDGES.

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A GENERATION OF JUDGES

BY

THEIR REPORTER.

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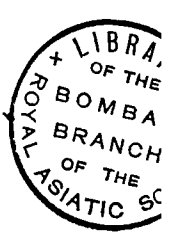
"Robes and furred gowns hide all."



LONDON:
SAMPSON LOW, MARSTON, SEARLE & RIVINGTON,
CROWN BUILDINGS, 188, FLEET STREET.
1886.

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LONDON:
PRINTED BY WILLIAM CLOWES AND SONS, LIMITED,
STAMFORD STREET AND CHARING CROSS.

PREFACE.

THE subject of this book is the Generation of Judges who held office during the last ten or twelve years, and are now dead, and it includes two men—Karslake and Benjamin—who by accident were not judges.

Judges are seldom heroes to their reporter. He has in his note-book too many of "our failures," as Brummell's servant called the basketful of his master's crumpled neck-cloths. Having at the same time no less a share in the production of judgments than the organ-blower has of the music, he is animated at least with the tolerance of a fellow-worker.

In any case, he has daily before him tests of the character and capacity of his judges, and seated in court among his fellow-barristers, as men come and go, he is inspired with the

whispered criticisms of the Bar on the Bench, and has breathed into his ear the freshest joke of Mr. Justice This, and the latest Circuit story of Mr. Justice That.

He thus reflects the knowledge and opinion of Westminster Hall, if that name may be retained until the Royal Courts lose some of their newness.

The information so gained and the judgment so formed of the judges of his time are here reported in all good faith, and as intelligibly as can be, by

THEIR REPORTER.

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A GENERATION OF JUDGES.

COCKBURN.

1856–1880.

AT a meeting of the Barristers' Benevolent Association, in 1875, in response to a resolution thanking Chief Justice Cockburn for presiding, proposed by the Attorney-General, and carried by acclamation in a full attendance of the Bar, Cockburn said: "If the results of my life at the Bar and on the Bench have been such as to command, or to obtain, the approbation and confidence of the profession, I shall be indeed satisfied with my case. If those before whom I have administered justice so many years, and who are best qualified to judge, believe that I have maintained the

upright character and the judicial integrity which have always distinguished the English Bench—if that be so, then indeed the dearest object of my life, and the highest hope of my ambition, have been abundantly realized."

Cockburn, as Lord Chief Justice Coleridge, his successor, reminded the Bar in delivering his panegyric in the Common Pleas at Westminster a few days after his death, "could not, more than other men, be made the subject of unmingled praise." But now that he has been dead some years, there is no reason to doubt that posterity will confirm the judgment of his contemporaries, that he not only maintained the character of the Bench and the Bar, which was so close to his heart, but added to the high traditions of the Bar, and increased the lustre of the name of Chief Justice of England.

Cockburn died at a moment when those who love their reputation as he loved his may well wish to die. He was in the fulness of years, but not in the decay of age. The seventy-eight years he had lived had not impaired his powers, either physical or mental.

His step was elastic, his action was animated and unconstrained, his eye was bright, and his voice had the ring of youth.

At the moment of his death, his contemporaries could not avoid laying the greatest stress upon his personal qualities, somewhat to the neglect of his more permanent merits. They missed the gracious presence which so lately had been among them, and they dwelt upon him as an orator rather than as a lawyer and a judge. For an orator he possessed the highest qualifications, natural and acquired. An expressive face and a natural propriety of action set off a voice which was always musical, and could be tender, or indignant, or humorous at will. It was one of those voices which not only convey the words of the speaker in the best form, but which imply a reserve of meaning beyond.

Curious investigators of causes may attribute much of Cockburn's personal charm to the French blood which he inherited from his mother; it is beyond doubt that he owed a great deal of his power over language to his familiarity with modern tongues. A good

acquaintance with the classical languages, added to the knowledge of French, German, and Spanish, supplied the right education for an orator. It would make some men linguists; but, added to Cockburn's other qualifications, it made him the greatest speaker of his day, and perhaps of his century. His powers of expression were strengthened by his training; but they were not hampered by it. He pronounced English as it should be pronounced, and his sentences were idiomatic, and sometimes racy. There was a precision in his use of words remarkable in an age of careless speaking, and on the Bench he would weigh his expressions accurately.

Besides his other qualities as a speaker, he possessed a vivacity which animated them all. The power of throwing himself into the subject is the essential characteristic of the orator. This impetuosity was subdued on the Bench; but it never was absent; and off the Bench he would sometimes be carried away by it so far as to give those who had never heard him at the Bar a glimpse of what his powers as an advocate were.

A speaker possessing these gifts cannot be a great judge unless they are tempered by self-control. How severe was the constraint to which Cockburn could subject himself was shown in the Kenealy incidents of the Tichborne trial of 1873. Such was the impression of power which the Chief Justice produced on the Bench that there were few men who dared take a liberty with him. A word from the voice which could speak daggers was generally enough. Kenealy's manner, therefore, while it showed exceptional pertinacity in him, was little likely to be brooked by a Chief Justice so accustomed to respect and almost subservience. But Cockburn knew that Kenealy's committal for contempt might prejudice the fairness of the trial of the Claimant in public estimation, and he refrained from that step, although it was fully deserved. The Tichborne trial in other respects was such as to test to the utmost the moral side of the judicial nature. The Chief Justice was unwearying in patient listening, and untiring in collating and expounding the facts. His summing-up was a model of lucid statement and elaborate reasoning.

Cockburn was criticized as having a weakness for being before the public, and apt to prolong inquiries raising topics of general interest in which he could be the central figure. It cannot be denied that there was some truth in this accusation, yet it is certain that he did not neglect small cases, but would try them with as much care, and as fully bring all his powers to bear on them, as if the eyes of England were upon him.

A more substantial criticism was that he seldom was able to resist a controversy. Like an old hunter who encounters a pack of hounds on the high road, a very small provocation sufficed to carry him off the beaten judicial track over the fences and ditches of polemics. In one case—the Mackonochie controversy of 1878—Lord Penzance was the provocative; and in another—a point of evidence—he made a County Court judge do duty for an opponent, although it must be confessed that Mr. Pitt-Taylor manfully retaliated.

These escapades were much to be deprecated; and there are some who would place his protest in 1868 against judges trying election

petitions and in 1871 against the appointment of Sir Robert Collier in the same class. Such deliverances were, however, within his province; and although the latter in no small degree contributed to the fall of the party of which Cockburn had been a member, it was right that, feeling as he did, he should say what he did. His objection to the judges trying election petitions has been falsified by the event on the main ground occupied by him, namely, that the ermine would be soiled by contact with politics. Since the transfer, petitions have been tried much more satisfactorily, and the Bench has not suffered; the only sufferer being the ordinary suitor who has been deprived of judges.

This protest was delivered against a Bill introduced by the Conservative party; and nothing is more noticeable in the career of Cockburn than his complete severance from political party after his elevation to the Bench. Chief Justices are generally credited with a desire that their mantle shall fall on a successor professing the same politics as themselves, and of regulating their resigna-

tion accordingly. No one ever suggested that such an idea was in the contemplation of Chief Justice Cockburn, although it was at one time said that he wished Sir John Karslake, a man of the opposite party, to follow him.

The position of Chief Justice develops Conservative instincts; and, although no man was a more loyal advocate of liberty than Cockburn, throughout his life he was thoroughly conservative as a lawyer. His strong imagination made him attach great importance to the traditions of the office which he filled, and the proposal of Lord Hatherley in 1870 to convert the Court of Queen's Bench into "Chamber No. 2" raised his indignation, and ever afterwards he appears to have taken a dislike to the new system introduced by the Judicature Acts. Those Acts were treated by him with coldness, and even repugnance. Their introduction gave a Chief Justice of his calibre the opportunity of becoming their great prophet and expounder had he been so minded; but he always treated them as a somewhat childish attempt to alter things by altering names. New statutes of all kinds,

too frequently in his later days, tempted him to criticize their policy or style in preference to interpreting them.

Cockburn's judgment in the great Geneva arbitration of 1872, which placed him probably at the highest point of his popularity with his fellow-countrymen, and which earned him his Grand Cross of the Bath, is that one of his productions which will go down furthest to posterity, while the immense research and elaboration which it displays are a monument of the industry he could put forth when spurred by a great occasion. Another performance perpetuating his name was his speech, as Attorney-General, in the Middle Temple Hall, at a dinner given by the Bar to Berryer, the French advocate. Combating the opinion expressed by Brougham, that an advocate in the discharge of his duty regards only the interests of his client, even if he "involve his country in confusion," Cockburn uttered the famous phrase, that the weapon of the advocate was the sword of the soldier, not the dagger of the assassin.

His criticisms of the Criminal Code were a

contribution to the subject of high value, and will do much to shape the ultimate form of that measure, not the least benefit conferred being the necessity for deliberation in bringing about those radical changes on which his letters insisted.

Probably one of the secrets of the hold which Cockburn had on the public mind was due to his reputation of having passed a somewhat stormy youth. "Whatever happens," he said, with a fondness of his own for a vernacular expression, "I have had my whack." After an attack of fainting on board his yacht, the *Zouave*, he had been told that he was suffering from *angina pectoris*. What was then anticipated happened three months later. The Chief Justice had sat in Court at Westminster and left a case partly heard. He walked across the park, as usual, to Hertford Street, dined, and went to bed. Shortly afterwards he rang his bell, was found by his servant in great pain, and died in a quarter of an hour.

The "whack" to which he lightly referred was a tolerably large share of favour and

success both in public and social life. It began when he was conducting criminal defences at the Exeter Quarter Sessions, and extended over the time of his gay association with Bulwer, Disraeli, and the wits of the day, through his Parliamentary career when in 1850 he leaped into fame in the Don Pacifico debate, through his forensic success when in 1852, as Attorney-General, he defended Newman in the Achilli case, down to the time when he was Chief Justice, a G.C.B., and the most prominent figure on the Bench for the greater part of four and twenty years.

In the earlier days of 1843 he had defended Macnaghten for shooting Drummond in mistake for Peel, but the best testimony to his marvellous skill in the conduct of cases was given by one of its victims, Palmer, the Rugeley poisoner, prosecuted by Cockburn as Attorney-General, and hanged for murder. At his trial, after the jury had returned their verdict of guilty, Palmer handed down to his solicitor a slip of paper. On it he had written, in betting-ring language, "It was the riding which did it."

The tales told of his youth on Circuit were of a kind to explain the rarity of his appearance as a Judge of Assize in the West. There is a window in the robing-room of the Castle of Exeter, by the friendly aid of which it is said the future Chief Justice escaped the bailiff, and a peculiar and extensive knowledge of the exact points at which the jurisdiction of the City Sheriff ended and that of the County Sheriff began was currently believed to have stood him in good stead at critical moments.

Cockburn's days and nights during Term were spent with a regular irregularity. He would return from his work in Court, and after dinner he would be found at the opera or a concert indulging his love of music, or at a reception, or perhaps he entertained a party of his own friends, including, it might be, the prima donna of the day, at the famous table of which he was the life and soul. He almost always went to bed between one and two in the morning with a "nightcap" of whiskey and water. His habit of moderate hours and strict temperance was, in a life the duties

and pleasures of which were both laborious, perhaps the cause of his reaching his seventy-eighth year. He did not rise early in the morning, but just in time to take a hurried breakfast, and dash into his carriage, with the words, "To Guildhall, as hard as you can go." At five minutes after ten he would appear in Court, and begin to try a special jury case as fresh and vigorous as ever.

His perennial vivacity was never better shown than in an after-dinner speech upon a semi-public occasion, when he felt among friends, and was free to say what he liked. He showed none of the stiffness of age, and his attitude and action had a boyish freedom about them. He appeared to be on wires. On one of these occasions a newly appointed judge from his old Circuit, of fresh and robust appearance, was welcomed by Cockburn to the Bench with many kind words, which he brought to a close by saying, "I have only one objection to make to him as a judge, and that is, that he looks so confoundedly young, that he puts us all to the blush."

No judge was more dignified on the Bench,

and few judges could throw off their dignity so well. On his last visit to the West, he dined with the Bar. After dinner, it fell to a very young barrister, who had sung a good song, to "call" upon some one else to contribute to the entertainment. With matchless coolness, he said, "I call for a song from the Lord Chief Justice." Cockburn was a little taken aback, but eventually he sang "The Somersetshire Poacher"—"It is my delight on a shiny night," in a broad West-country dialect, with great gusto and in good style, to the huge gratification of all present.

Few who saw Cockburn as he sat in Court, looking every inch a gentleman, his wig and gown carefully adjusted, his bands neatly smoothed, and his delicately coloured handkerchief in his hand, would recognize him after he had passed the door of his Court with a jaunty step, and swinging his umbrella. Cockburn in the street looked for all the world like a groom taking a holiday. Not that he was at home on horseback, although he amused the leisure of his latter days by writing papers on the history of the chase, by which his

imagination had been inspired. In fact, he sometimes perilled his life in a gallop; but his gait and stature in walking gave him a mean look. He was fond of shooting, and more expert than Lord Westbury with the gun, in spite of the story told of them when they were law officers together. Cockburn went to stay with Bethell, and in the course of a day's shooting Bethell managed to pepper one of the keepers with shot. Some time afterwards, when the two were talking of business in the presence of others, Bethell forgot what had happened on a certain day, when Cockburn reminded him that they were together. "Ah, yes," said Bethell, with his usual drawl, "I remember that was the day, Cockburn, when you shot my keeper."

Turning from these indifferent matters, which yet go to make up the character, to weightier things, it must be said that Cockburn's unfortunate want of sympathy with the Judicature Acts lost him the chance of making such a figure in the history of English law as was made by some of his predecessors, and particularly Lord Mansfield. These judges

made law because there were gaps of importance to be filled; while modern judges can merely follow their predecessors so far as the great outlines of law are concerned. Cockburn lost this opportunity, but much as he disliked these Acts he could not prevent their making him Chief Justice of England, a title which some of his predecessors had already usurped, although legally styled Chief Justices of the King's Bench. When the abolition of the chief-ship of the Common Pleas was contemplated, the title of Chief Justice of England was conferred on the now only surviving Chief Justice.

Cockburn may, however, be said to be the creator of much of the law of libel, particularly so far as regards the public press. The meaning of the reservation in favour of privileged publications had, up to his time, been very vaguely understood in many of its applications. It was Chief Justice Cockburn's task to make it clear. In *Wason* v. *Walter*, he decided that a full and faithful report in a newspaper of proceedings in Parliament, although defamatory, cannot be the subject of an action—a point upon which there was a total absence of

direct authority up to that time. On the other hand, in *Campbell* v. *Spottiswoode*, an action against the *Saturday Review*, it was laid down that a newspaper is not privileged *per se* to write whatever is *bonâ fide* believed by the writer, and base motives may not be imputed without reasonable ground. In both these cases Cockburn presided at the trial at Nisi Prius as well as at the argument in Banco; and he also tried *Seymour* v. *Butterworth*, where the question was, Whether personal vindictiveness had been indulged in under cover of public criticism? He also took part in *Kœnig* v. *Ritchie* at Nisi Prius—a case involving the privileges of pamphleteers in answering one another.

In these, and other cases, he may be said to have shaped the law of libel in regard to the press, so that it is now well understood. The general principle which inspired Cockburn was perfect freedom of discussion of public men, stopping short, however, at attacks on private character, and the reckless imputation of motive.

The part taken by him in 1867 in his charge

to the grand jury at the Central Criminal Court in the Jamaica case, in which he laid down the limits of military law, was his greatest contribution to the cause of personal liberty, which he always had at heart. For clearness of expression and closeness of reasoning, his judgment in the *Franconia* case, in which he held with the majority, that the English Courts had no territorial jurisdiction outside low-water mark on the sea, is a good example of his style. His devotion to the cause of justice is well illustrated by the persistence with which he maintained the cause of Galley, a man who was convicted in Cockburn's presence at Exeter, when he was a young man at the Bar. Cockburn believed in his innocence, but vainly tried to have the sentence reversed. When he was Chief Justice, and not long before his death, the case was brought to his notice again, and through his exertions the stigma of conviction was removed from the man, who had been sent into transportation, and had flourished in Australia.

The estimate of his manner of presiding at jury trials will probably be taken from the

Tichborne case. His summing-up, which all agree to be a marvel of lucidity, has been criticized, especially across the Atlantic, whence our cousins canvass legal proceedings in England with keen interest and intelligence, as too unfavourable to the defendant. There are, in fact, two distinct courses for a judge to take in summing-up to a jury. He may either recapitulate the facts and leave all the responsibility to them ; or, having formed an opinion on the various issues in the case, he may point out to the jury the considerations tending to that conclusion, giving them, at the same time, all the considerations which have an opposite tendency. The first plan is that of a weak judge, and the other is the one adopted by Cockburn. By the first view of the judge's duties, juries are deprived of the best part of the experience, training, and intellectual superiority of the judge ; while, in the plan adopted by Cockburn, they have the full benefit of the judge's assistance. There can be no question of the superior advantages of Cockburn's system in the hands of a man like him ; the only danger is that it may be adopted by

weaker judges in cases in which they cannot do justice to the facts in all their bearings.

Chief Justice Cockburn will undoubtedly take rank among the great English judges of the first class. He excelled them in so many things, that his incompleteness in technical knowledge will not keep him out of their ranks. Of this failing, due to a hand-to-mouth education in law, he was conscious, and sensitive of its discovery, but skilled in making a dignified retreat.

With a Blackburn by his side, his shortcomings in depth of learning were easily supplied. In his manner to the Bar he set an example of perfection in courtesy which succeeding judges may well attempt to approach. That one among the later Chief Justices with whom a comparison naturally arises was Lord Denman, and when we see how greatly he excelled Lord Denman, we are able to say how high a place he will take in legal history. His death enriched the traditions of his office, by which his successors should be inspired as fully as he himself by the greatness of his predecessors.

LUSH.

1865–1881.

LUSH is known to the world as one of the three judges who took part in the Tichborne trial, and as a judge guilty of the eccentricity of preaching on Sundays. Among lawyers he was known as the most expeditious and effective of the Nisi Prius judges of his day. He made his way to the highest judicial offices solely through his individual merits, and won his success step by step without the sudden upward push which politics give, and his career began almost at the very bottom of the professional ladder, as an articled clerk in a solicitor's office.

Besides these elements of popularity among his fellows, Lush possessed an energy and rapidity in his work, combined with a perfectly

forensic habit of thought and manner, which made him one of the most desirable of judges before whom to try a cause. He could be relied upon to show no caprice or crotchet, and to do his judicial work with a fairness and patience which inspired confidence in all concerned. But his businesslike capacity at Nisi Prius and in Courts of practice were lost to the public when he was, more than a year before his death, raised to the Court of Appeal on the death of Thesiger.

His elevation was a well-deserved compliment, just as his admission to the Privy Council had been a recognition, tardily made, of his services. But in the Court of Appeal Lush was looked upon, less as likely to illuminate the law by judgments which would last, than as one of the few judges able by his experience to carry the tradition of the past into the present. It seemed as if the new system were having a fatal effect on the judges. With the exception of Lord Blackburn, who was raised to the Bench three years after Lush, there was at Lush's death no occupant of the Bench created since 1868, and

nearly half the judges had been made since the Judicature Acts came into operation. The presence on the Bench of Lush, who was the successor of a judge so far distant from us as Crompton, was one of the links with the past system of procedure rapidly becoming fewer and fainter.

His career had a consistency about it which makes it not difficult to estimate. His fault on the Bench was over-confidence in his opinion, and tenacity of the view once formed. His motto, when he was made a serjeant, "*Tenax justitiæ*," aptly, and perhaps consciously, expressed his character, if it be taken to refer to tenacity of his own view of law and justice. This quality—which rendered it sometimes difficult to dislodge an opinion formed, it might be, on insufficient knowledge—although in his way on the Bench, was of the highest use to him at the Bar, where the necessity for speedy action makes a rapid judgment essential. His tenacity of character, combined with an acknowledged superiority in practice, an excellent knowledge of law, sublimated by his experience as a special pleader, and great

fluency of expression, was the cause of his success at the Bar. His cases were naturally those which are known as "heavy causes," in which sterling qualities, as well as tact and knowledge of the world, are required, but in which verdicts are not won by eloquence or strokes of genius.

On the Bench, his best title to fame is that he was the most perfect Nisi Prius judge of his time. His briskness was communicated to counsel, witnesses, and jurors, without ever degenerating into hurry. The over-tenacity already referred to did not display itself in the appreciation of facts, and on points of law was tempered by complete candour when once an opinion was shown to be unfounded. Lush did not possess the smallness of mind which makes some ashamed to retract an opinion. He had too much confidence in his own reputation for any such weakness. In *Brand's* case, he in the House of Lords recanted his opinion in the Queen's Bench that a railway company was not bound to compensate for vibration, although that opinion turned out to be orthodox. On the hundred and one

collateral questions which arise in a trial of any complication, he gave his decision rapidly, and, what was more, was generally right.

The ease with which he fell into the trial of criminal cases was an example of great adaptability. Until he was made a judge, Lush had never seen the inside of a Criminal Court, and yet after a very short time he was equally efficient in trying prisoners as at Nisi Prius, and so great became his experience at last, that he was chosen one of the committee of judges to criticize Sir James Stephen's Criminal Code. He saw the crucial point of the evidence with marvellous quickness, kept the case within its due bounds without any appearance of impatience, summed-up shortly and clearly to the jury, and dismissed the prisoner, if there was a conviction, with a few practical words of warning. Few could discover, from seeing Lush on the Bench, that he was a man of deep religious feeling and a preacher at the Baptist Chapel in the Regent's Park which he attended. He knew his business too well to preach in Court; and the only point at which his religious opinions can

be said to have come to the surface was in the form of words used by him in sentencing to death. Instead of the usual form at the end of the statutory sentence, "And may God have mercy on your soul!" Lush would say, "And may you be led to seek and find salvation!"

With all his sincere religious conviction, he was not socially austere, still less fanatic. The records of the Wine Committee of the Home Circuit would show that he did not neglect his wine, and he continued almost to the end of his days the old-fashioned habit of finishing his bottle of port after dinner. Perhaps it was a recollection of this indulgence which, in Westminster Hall, on November 2, 1865, suggested a joke on his name and that of a colleague in the Queen's Bench appointed about the same time, Mr. Justice Shee. As the new judges walked up the hall, there were loud cheers, and cries of "Lush and Shee." "Lush and Shee!" said a bystander; "that is the old toast of 'Wine and woman.'"

Lush will not take the highest rank among the lawyers of the past. It was as a practical worker that he must be judged. He wrote

books, but none of them have survived. One of his books was an edition of "an act to abolish arrest on mesne process," a statute passed in the first year of the Queen's reign, getting rid of the practice familiar to the history and the romances of the previous period, when a man, by swearing that another owed him twenty pounds, could have him immediately arrested. His "Practice in the Superior Courts" is better known. A reputation as a legal writer can hardly be made on the sandbank of procedure, although a successful book on Practice may give a fillip to a lawyer's success. His reputation for skill in questions of procedure was utilized in the drafting of the Judicature Rules, and in 1875 he was selected to sit at Chambers to give them a fair start. All that can be said of Lush's books is that they were valuable in their time, but they were permanent neither in subject nor treatment.

A similar observation might with some truth be made on his judgments. He did not leave his mark in any branch of the law, although he did good service in all branches. In the

Mackonochie case, he turned out, according to the opinion of the Court of Appeal and the House of Lords, to be right when Cockburn and Mellor were wrong. Possibly it would have been a more fitting termination to his career if he had died a judge of first instance. He was made a Judge of Appeal too late, when the elasticity of his mind had begun to fail. Possessed of a fair knowledge of equity, he might at an earlier period of his life have done as good work in deciding Chancery appeals as he had already done in other departments of the law.

Partly from the cause already assigned, and partly from the loss of his wife which took place early in the year, Lush did not appear at home on the Bench of the Court of Appeal, especially in hearing Chancery cases. Some signs of failure were visible at the last assizes which he attended, when he seemed to have lost a part of his vivacity and acuteness of perception, and later he showed an appearance of physical breaking-up, alarming to all who had known him long, and justified by the result. He left behind him as high a reputa-

tion as any judge may wish to leave for singleness of purpose and honest and efficient labour in his high station, none the less because he himself was absolutely careless of his fame.

QUAIN AND ARCHIBALD.

1872–1876.

QUAIN and Archibald were both made judges in the year 1872, and both died within a month of one another in the year 1876, but there the parallel ends. Quain was a little, lively, rubicund man, whose temperament was suitable to, and whose manners were formed by, the breezy atmosphere of the Nisi Prius Courts of the Northern Circuit.

His diminutive but rather fiery presence and voice pitched in a high key were a strong contrast to the tall figure, deep voice, and grave manner of Archibald, as they sat together in the little cockpit at the back of the Court of Queen's Bench at Westminster, which went by the name of the Bail Court, before Archibald was translated to the Court of Common Pleas.

Archibald was trained as a lawyer in the school to which so many of the best judges of recent years are owed, that is the chambers of the Attorney-General. Probably Archibald would have been shocked to have heard himself called the Attorney-General's "devil," but such, when he was Treasury Counsel, was his title in popular professional language. Archibald succeeded Hannen, also a judge, and Bowen and Smith, judges too, followed him as Treasury Counsel, and the succession will doubtless be continued. In this character he drafted the Act commonly called "Bovill's Act" (for the "devil" forges renown for his master, the Attorney-General), which simplified petitions of right, the procedure by which the subject obtains justice in matters of money and property as against his sovereign.

One of the peculiarities of the training of judges coming from this source is that they have never been Queen's Counsel. They lose from this fact some of the fluency and readiness which Nisi Prius gives, and are, therefore, perhaps less at home with juries than in deciding points of law. There can be no

better education for a judge sitting alone, which is now the popular tribunal in civil cases, than the work of an Attorney-General's "devil." In the advice he gives he has to be sure of his facts, and tolerably sure of his law, as the Crown cannot afford to be dragged into litigation without good reason. Another advantage of this class of judge is that he cannot be a politician. Since the day of the judges mentioned, an attempt has been made to break through this rule, which, if imitated, will injure the claim of Treasury Counsel to the Bench in reversion.

Archibald hailed from Nova Scotia, where his father had been Master of the Rolls. He had great knowledge of law, pointed by his practice as a special pleader (an advantage which lawyers unfortunately do not have nowadays) and a solid judgment; but four years on the Bench were hardly sufficient to bring out capacity as a judge, either in his case or in that of Quain. The feeling with which the early death of Archibald inspired professional opinion was something like that inspired by the death of Wickens. It was a

common belief that Archibald would have made a most successful judge, while the general opinion of his personal character was aptly expressed by Lord Coleridge in the eulogium pronounced by him as Chief Justice of the Common Pleas: "No one was fitter than he to be taken from the great task of judging others to be judged himself." His faults were an abruptness in his judgments and a distrust of his own opinion.

Towards Quain Westminster Hall was hardly so favourably disposed as towards Archibald. Quain was one of the first men of eminence given to the world through University College by the University of London, and he obtained his first legal training in the chambers of Thomas Chitty, the pleader. He always took an interest in legal education, and by his will devoted £10,000 to its purposes, subject to the life interest of his brother. Neither judge was wanting in manner; Archibald was habitually courteous, but Quain was a little impulsive. He had the reputation of being fond of good cheer, while over Archibald there was a cast

of melancholy, although he was believed not incapable of quiet rejoicing. There was an appearance of permanence about Archibald, but no expectation for the future was formed of an individuality so volatile as Quain's.

The career of these two judges gives no scope for anecdote. They were not witty or original in themselves, nor the cause of either quality in others, except possibly in regard to their names. The general public, and especially the writer for the press, long insisted that Mr. Justice Archibald was called "Archbold," a name voluminously attached to English legal literature, and so indelibly associated with the law as not to be easily displaced. The name of Quain fell an easy prey to perversion. He was made a judge in days when it was requisite that he should be first admitted a serjeant. It was the custom for serjeants to present rings with a motto, and as the serjeantcy of Quain was purely by way of necessary qualification for the Bench, it was suggested that his motto should be "*Sine quâ non.*"

Quain and Archibald lived in the palmy days of the Queen's Bench, when there was

no appeal, except in rare cases to the ample bosom of the Exchequer Chamber, where the decisions of the Queen's Bench would be reviewed by the friendly eyes of their brothers of the Common Pleas and Exchequer, conscious that next week the Queen's Bench would be performing the same kindly office upon their decisions. In those days, all important cases in the Queen's Bench were heard before four judges, and Quain and Archibald often sat with Blackburn and Cockburn. It was this Court of four which tempered the view held by lawyers that Scotland is a foreign country, by deciding that, since English judgments can be enforced in Scotland, Scotch plaintiffs are no longer, like Frenchmen and Germans, bound to give security for costs when they sue in English Courts. It was they, too, who succeeded in bringing to book no less formidable a judge of an inferior Court than Mr. Commissioner Kerr, when he showed a tendency not to obey their orders unless he approved them. The Commissioner, however, by the mouth of Sir John Karslake, successfully asserted his right to the dignity of a

mandamus, and would not be put off like a County Court judge with an ordinary rule. Sitting by themselves, Quain and Archibald had the courage to order a new trial on the application of the plaintiff in an action of slander, in which the jury had given a farthing as damages.

In the celebrated case of the *Franconia*, in which the extent seawards of the jurisdiction of the English Criminal Courts was argued before fourteen judges, Archibald played a remarkable part. He heard the argument, and was believed to be in favour of the Crown, but he died before judgment was delivered. If he had lived, the Court would have been equally divided. When a Court is divided, junior judges often withdraw their opinions to make a decision, but seldom has an opinion been withdrawn in so solemn a way as in this case. Archibald was also a member of the Court in the famous case of *Riché* v. *Ashbury*, which afterwards went to the House of Lords, and settled the law as to the acts which an incorporated company may do within the powers of its constitution.

Quain and Archibald, so closely associated, may be taken as fair examples of that class of judge which, without adding lustre to the Bench, supports it by knowledge and sound judgment.

KELLY.

1866–1880.

In Kelly the office of Chief Baron came to a dignified end. The Norman "baron" was individually a man; in his relation to woman a husband; and in his relation to the King a King's man, a holder of King's land, a member of the King's Council, a Parliament man—in which form he long survived in the House of Commons as baron of the Cinque Ports—and finally a nobleman.

The barons of the Exchequer were members of the Court of Revenue, who sat at a table crossed in squares like a chess-board for reckoning accounts. The Lord Treasurer, or First Lord of the Treasury, was a member, and it had its Chancellor, which functionaries down to the time of its disappearance sat in the Court of Exchequer on the morrow of St.

Martin, and still sit on that day in the Queen's Bench Division, which has absorbed it. The routine business had long been handed over to the Cursitor barons, a name surviving among the purlieus of the law in Cursitor Street, and from them to obscure officials, until nothing of the ministerial side of the Court was left except the naming of the Sheriffs, the reception of the Lord Mayor of London, and the swearing of the Chancellor of the Exchequer to the due application of the secret service money. Revenue causes between subjects and the Crown still belonged to this Court exclusively until 1881, when the legal and ceremonial functions of the Exchequer were merged in the Queen's Bench.

The rightful jurisdiction of the Exchequer in its character of "Her Majesty's peculiar court," as Chief Baron Kelly loved to call it, was in modern times less important than its usurped jurisdiction. The barons reconciled it with their consciences to hear all kinds of cases, and reap a harvest of fees for themselves, by allowing the plaintiff to say that he was the King's debtor, and peremptorily forbidding

the defendant to deny it. In this encroachment it was no worse than its neighbours, the Queen's Bench and Common Pleas, which resorted to like devices. If its roll of names does not equal in fame that of the rival Benches, it held its own tolerably well, especially at the close.

During the last century of its existence the Exchequer had been the reputed home of technicality and special pleading; but, when all is said, Barons Alderson and Parke had a genuine sympathy with law not always conspicuous in their successors. Among the predecessors of Kelly were Sir Matthew Hale, Chief Baron Gilbert, the "Archbold" of the libraries of his day, and Comyns, the author of the "Digest." With Lyndhurst, Abinger, Pollock, and Kelly in unbroken succession, the office of Chief Baron ended well.

The career of Chief Baron Kelly was incomplete in one respect, and too complete in another. He ought to have died a peer of Parliament; and he ought to have left the Bench four years before he died.

The reason why these two events were not

brought about opens a chapter in the Chief Baron's career which did him honour, and by which probably his name will be best known in history. The party to which the Chief Baron had rendered good service was in power. Kelly, it is true, had suffered pecuniary losses; but, as he had no son, his peerage would not have called for an endowment. In investing money as a trustee in the Agra Bank Kelly had been guilty of a technical breach of trust, and replacing it, which he did with alacrity, had crippled his resources. Retired from the Bench and a peer, he would have found vent, without reproach, for those political utterances which, breathed on the 9th of November into the ear of the Lord Mayor from the Bench of a Court of justice, were out of place. It can hardly be supposed that his party were guilty of the ingratitude of forgetting a man who had served them, but whose services were no longer valuable. Lord Beaconsfield, who possessed few more ardent admirers than Kelly, had no reason for excluding him from the House of Lords. A man who has filled, with applause, one of the

highest offices of the law, has a well understood claim to be elevated to the peerage. Holker, the Conservative Attorney-General, would have been very glad to seek the repose of the Chief Barony, and it was suggested to Kelly that he should resign, that a Conservative might succeed him. If this idea had been carried out, the amalgamation of the Queen's Bench, Common Pleas, and Exchequer Divisions, and the abolition of the chiefships of the two last divisions might have been indefinitely postponed, and the course of legal history might have been different, as it was only the fortunate accident of Kelly and Cockburn dying together within a month that made it possible for Lord Selborne to carry out the scheme at one blow. But Kelly's terms were not accepted, and he was rightly obdurate.

The explanation is to be found in the collision between the Chief Baron and Lord Cairns in regard to the right of Privy Councillors sitting on the Judicial Committee to publish the opinion they had formed in particular cases.

The controversy arose out of one of the

ecclesiastical cases so numerous about the middle of the century. Kelly took a deep interest in the question, and in the year 1866 he, in consultation with Bovill, Coleridge, James, Hannen, and Phillimore, all at the Bar, and subsequently on the Bench, advised the Church Union that wearing vestments was authorized by the rubric. Ten years later, he, as well as Lord Justice James, was a member of the Judicial Committee who heard the case of *Ridsdale* v. *Clifton*. Not long after that decision Kelly fell into conversation on the subject of vestments with Mr. Ellis, the Sheriff's chaplain in one of the counties of the North Wales Circuit, which he was travelling. Kelly, with his usual candour, did not conceal his opinions on the subject. He told the chaplain that he dissented from the judgment of the majority; that he did not care who knew it; and that the judgment was policy rather than law. The Sheriff's chaplain incautiously wrote to the newspapers, with the addition that Kelly had called the judgment iniquitous. For a Privy Councillor to apply that epithet to a judgment of his colleagues

could not be passed over, and Kelly, in a letter to Mr. Ellis, explained that he had not used it, but admitted the rest of the conversation, adding that he very much regretted that it had appeared in a newspaper. The matter might well have been allowed to drop there, but the correspondence went to Lord Cairns, the Lord Chancellor, who thereupon addressed a severe admonition to the Chief Baron, stigmatizing what he had done as a serious departure from what had been considered the obligation of a Privy Councillor. In order to crush Kelly more effectually, he dragged to light an ordinance of the Privy Council of 1627, which forbade Privy Councillors divulging "how the particular voices and opinions went." This ordinance was published nearly two hundred years before the Judicial Committee was thought of, and no one supposed that it referred to legal business. To make assurance doubly sure, Lord Cairns, in February, 1878, with the concurrence of no other lawyer, but only of two dukes and two subordinates of the Government, passed a fresh ordinance applying the order of 1627 expressly

to judicial business. This high-handed proceeding was generally condemned, as well as the policy of silencing judges which dictated it. Kelly replied in a pamphlet, in which he questioned the legality and expediency of the whole proceeding.

Unless the judgment of legal history reverses the opinion of the day, the Chief Baron was in the right; and the resolution with which he maintained his opinion, in spite of the injury he knew he was inflicting on his personal interests, was a proof of independence of spirit of more value to his reputation than a peerage.

The Chief Baron was not allowed to retire for the same reason that he was not allowed the peerage. He no doubt did not feel inclined to listen to overtures for his retirement unless the offer of a peerage were a preliminary step. The maintenance of an aged judge on the Bench after the time has elapsed when he can readily perform his duties, is bad judicial economy. In such circumstances a retirement even on full pay is a pecuniary saving, and, if a condition of such retirement is a peerage, it requires a strong reason to justify its refusal.

It thus came about that Kelly will be handed down to posterity as a veteran who lagged too late upon the stage. It so happened that he was some time past sixty when he obtained his reward of promotion, and there was the more reason why he should have retired at the earliest period of service, when it is usual for judges to retire.

As a survival, he represented the virtues and the failings of a past judicial age. There could hardly have been a better example of the stately dignity which is among the things of the past equally with ruffles and walking-swords. Chief Baron Kelly was the only judge of his time who came out becomingly from the trying ordeal of walking up the nave of St. Paul's in his full robes and with his train-bearer behind him. Even to the last he had nothing of the stiffness of age about him; and he used to boast that he felt as fresh and active as a boy. A year or two before his death he was walking home by the Marble Arch on a foggy night, when just at Tyburn-stone he was attacked by two garrotters. The aged judge put his back against the railings

and kept them off with his stick until assistance arrived. Though much bruised, he was in Court again two days afterwards.

Kelly was by far the handsomest judge of his day, and as he leaned back on his pillow on a weary summer's afternoon at Westminster, and gently slumbered, his pale face and finely cut features might have belonged to a Greek statue.

His faults were of the old-fashioned kind, in the sense that they were on the surface; and he did not deceive himself into thinking that he was serving high objects, when he was really serving himself and his friends. Chief Baron Kelly did not hold the opinion, now everywhere professed in theory but frequently disregarded in practice, that patronage is an absolute trust for the benefit of the public. The public man who in dispensing patronage openly acts on the principle that he may serve his friends so long as the public is not injured is less dangerous and more honest than he who expresses the most elevating principles, and does not act up to them.

His absence of cynicism must also, unfor-

tunately, be reckoned old-fashioned. Without being credulous or easily deceived, he had none of the undue suspiciousness which is a bad development of the lawyer's character. As a Tory of Tories, and as the head of a Court with a great history and traditions, almost the last remnant of which disappeared with him, he was no friend of the great changes taking place around him. The Court of Exchequer perhaps suffered most of all the Courts destroyed by the Judicature Act. The name of the Queen's Bench still survives, and the Common Pleas had not so interesting or so distinctive a history as the Exchequer, in which, after Kelly, was the deluge, as he well knew would happen.

He did not oppose the Judicature Acts. He simply ignored them, except in so far as they altered the details of practice. It would have been sacrilege to speak of the Exchequer Division, the High Court of Justice, or the Supreme Court of Judicature before him, and he hardly condescended to smile when a learned but unorthodox brother of another Bench, referring to the shadowy nature of

these Courts, called them the three incomprehensibles. Nothing could exceed his astonishment and indignation to be told when he obtained a new puisne that his proper title was Mr. Justice Hawkins. He simply refused to allow him to be so addressed. If the ancient and distinctive title of Baron was denied, he should be called simple Sir Henry Hawkins, a style by which he was always afterwards addressed in the Exchequer, and is still known among officials who served in that Court.

A trait distinguishing him from some of his younger brethren was his grasp of general principle in preference to decided cases. The modern lawyer is too apt to run to his bookshelves for a case which has some resemblance to that in hand, although the resemblance is frequently accidental. Of late years, some powerful intellects on the Bench have been directed to the task of breaking down this unhealthy habit; but still it is a vice of the time. During his latter days, the Chief Baron seldom professed a previous acquaintance with any case that was cited to him less than forty years old. He would examine a case, when

cited, by the light of the principle involved, and use it as an illustration in his judgment; but his knowledge of law was founded on general rules, and was unconnected in his mind with an action which at such and such a date was brought by A. against B. and decided in a particular way, or with an obscure passage in Comyn's "Digest." Kelly's application of law appeared to be instinctive, so deeply was he imbued with its elements. The difficulty of making him understand the facts once surmounted, the law might be left to take care of itself. If the Chief Baron differed from his brethren, the chances were that he would turn out right. In the case of *Mordaunt* v. *Mordaunt*, he differed from his colleagues in holding that the insanity of the wife was no ground for withholding a divorce from the husband, a view which was afterwards upheld by the House of Lords. His summing-up in *Rubery* v. *Grant*, an action for a libel in the City article of the *Times*, was a model of comprehensiveness.

The process of inserting the facts into his mind was in his later days long and difficult,

and in the course of it the peculiarities for which he was famous came out strongly. No sooner was a fact, however unimportant, mentioned, than the Chief Baron immediately asked, "What is the date?" In the long run he was right, as no story can be properly appreciated except in order of time. Kelly, however, made a good rule too common. He had an absolute passion for dates, and sometimes when he demanded them on unnecessary occasions put the counsel before him to the task of inventing them. "Give him some date," said a leader to his junior thus hard pressed; "any date will do to keep him quiet." At these times it was an interesting spectacle to see how, when Kelly was perplexing a case in Banco with endless repetitions and immaterial inquiries, Bramwell, his old pupil, sitting on his right, would firmly and tenderly take him in hand, and make all plain with a few trenchant statements.

His style of speaking, never in his younger days concise, developed in his age into tediousness. "My good woman," he would say to a witness, "you must give an answer, in the

fewest possible words of which you are capable, to the plain and simple question, whether, when you were crossing the street with the baby on your arm, and the omnibus was coming down on the right side, and the cab on the left side, and the brougham was trying to pass the omnibus, you saw the plaintiff between the brougham and the omnibus, or between the brougham and the cab, or between the omnibus and the cab, or whether and when you saw him at all, and whether or not near the brougham, cab, and omnibus, or either or any two, and which, of them respectively—or how was it?" In the course of arguments in Banco he became garrulous, and his judgments were very easy to take down. If any passage were missed, the reporter had only to wait till he came round to it again. Like a race run in laps, Kelly's judgments always passed the post several times.

Few lawyers had a more varied experience of professional practice than Kelly. His knowledge, acuteness, and eloquence were often brought into requisition in the Chancery Courts; and he was engaged in many

important criminal cases, not only as a law officer of the Crown but as defending counsel. One of these was the trial for high treason of Frost, whom Kelly defended in conjunction with Pollock, his predecessor as Chief Baron. Another was the prosecution of Tawell the Quaker for poisoning. Kelly suggested in the defence that the victim was poisoned by eating too many apples, from which he received the nickname of "Apple-pip Kelly," which clung to him for some time. The necessity for the rising lawyer to add politics to his professional pursuits brought Kelly in contact with persons and events from which he gained some discredit. In spite of his culture and great, if diffuse, eloquence, he was not a success in Parliament, even as Attorney-General. He was ambitious of being Chancellor, and died a disappointed man. As a judge, the last Chief Baron will not take rank among those who made law or expounded it with undisputed authority on every subject touched, but he filled his high office worthily, and is remembered with respect and affection by those who come after him.

CLEASBY.

1868–1879.

BARON CLEASBY was the most amiable character of his day on the Bench. The love which his brother judges bore him was not marred by any of those feelings of rivalry or jealousy which sometimes flutter even the judicial breast. His self-effacement was incapable of exciting jealousy, and no one could be the rival of a man who thought so little of himself. He was always ready to take a turn at somebody else's work, and when asked an opinion on a perplexing point of law would give up his time to consider it, and send his learned brother away comforted, knowing that he had the best opinion of a man whose opinion was worth having.

In appearance he was tall, thin, and lantern-

jawed, and his gait was disfigured by a lameness which gave a ludicrous turn to the dignity of his judicial robes as he limped into Court. In his youth at Eton he had been an athlete; but before he reached manhood, he caught a chill at Ramsgate, had a fever, and developed a condition of body which, aided by a blow from a cricket ball, ended in an abscess in the hip-joint.

To the end of his days he was fond of sport, and a good shot. He was rich, having inherited a fortune from his father, a Russian broker. He belonged to a good Yorkshire family, settled near Darlington. He was a third wrangler and first-class in classics, an admirable linguist and a good musician, and he was a judge. Yet, with all this, he was the most unassuming man that could be.

In politics he was a strong Tory. Twice he contested Surrey, and in 1868, after unsuccessfully contesting Cambridge University, which in those days returned a Liberal, he achieved his judgeship. To have fought and lost sometimes gives a better claim to consideration from party leaders than to have

won, and so Cleasby was made a judge by Lord Cairns, when three new judges were added to strengthen the Common Law Courts for the trial of election petitions.

Cleasby never had much practice at the Bar. His manners were too mild for the boisterous air of Nisi Prius on the Northern Circuit, and he was too timid for a cross-examinant. What business he had was mostly in Banco, and that scene was most congenial to him when on the Bench.

No one ever encountered a harsh word from Cleasby, except that he had a way of sternly rebuking prisoners for the enormity of their crimes, and finishing with a ridiculously small sentence. "You are one of the worst men I ever tried," Cleasby would say, "and the sentence of the Court is that you be imprisoned for one month."

So it came about that he was not only popular with the Bench and the Bar, but with criminals. "You are committed for trial," said a magistrate to a ruffian who was up for his fourth case of housebreaking, "and you may choose whether you are tried at the

quarter sessions next week, or a month hence at the assizes." "Who is the judge of 'soize?" asked Sykes. "Baron Cleasby," said the magistrates' clerk. "Oh, I'll go to 'soize," returned the criminal, with alacrity. "Cleasleby is the judge for me." It was with feelings of pain that he sentenced O'Connor, the half-witted assailant of the Queen, to be whipped, although it was only with twenty strokes of a birch rod.

He died in his seventy-fifth year, in October, 1879, having retired from the Bench in the previous January. He was thus, although officially among the younger judges, yet in years among the oldest. For some time his health had not been good. His increased lameness debarred him from taking the exercise which in more active days he deemed indispensable, and he had fallen a prey to bronchitis.

As a judge, no man was ever more anxious to do right, more patient, or more laborious. His faults were extreme caution and slowness at Nisi Prius and in criminal trials, and in Banco too great an aptitude for the part of dissenting

judge. His virtues were his great learning, modestly concealed, but extending very far beyond the modicum which does duty on the Bench; his accurate judgment on abstruse points of law; and his sound practical sense. Investigation of his judicial life would reveal more than one example of his disagreement with the majority of his brethren in the Exchequer or in the old Exchequer Chamber, and of the vindication of his opinion by the House of Lords. For example, the opinion which he, in conjunction with Willes, maintained against Chief Justice Bovill, Montague Smith, and Blackburn, that an agent employed to buy cannot sell his own goods without disclosing the fact, in spite of a custom of the tallow market to that effect, was sustained in the House of Lords. The more intricate the point of law at issue, the more likely Cleasby was to be right. In fact, that type of intellect which at the University of Cambridge won for him his high honours and a fellowship at Trinity College made him at home with the science of law. On the other hand, he was not as ready and quick in matters of practice,

points of evidence, and Nisi Prius tricks as many men of far less mental calibre. Cleasby's demeanour to the Bar never produced the slightest syllable of complaint. The younger members of the profession, when he retired, missed that uniform forbearance, kindness, and attention which are not always extended to counsel unknown to fame. Once, and once only, during the ten years that he was a judge, was Cleasby ever known to say anything unkind, and that was under his breath, in the hearing only of a brother. In a criminal trial on Circuit he had to endure a long and not very pertinent speech from a great defender of prisoners. His brother-judge looking in at the door behind his seat, overheard him say, plaintively, "Oh dear, oh dear, what will he say next?" For serenity of temper, pleasant address, readiness to listen, and anxiety to do justice, Cleasby was conspicuous; but perhaps his greatest characteristic was the universal affection he inspired.

WILLES.

1855–1872.

WILLES had the reputation of being the most learned judge of his day. His only rival in this claim was Blackburn, and he was fonder of displaying "black letter" than his almost equally learned brother. There was even an impression at the Bar that Willes would lead the argument in such a direction that he might carelessly throw out a carefully prepared reference to Bracton or the Mirror. He would sometimes unnecessarily crush the argument of a young aspirant at the Bar by telling him that what he argued had been decided the other way in the fifteenth century, as reported in the Year-books.

If there was considerable affectation of learning in Willes's intellect, there was some affectation

of antiquity in his person. In his later days, his grave, cadaverous face, set off by a short grey beard, might have belonged to an Elizabethan judge. He was the only man in Westminster Hall who tied the strings of his black robe properly. Generally these strings are to be seen flying out at the back of the wearer like the ribbons of a Highland piper, and the result is that when he sits down the robe falls off the back in a *negligé* style, much affected by barristers at the Old Bailey, but tabooed in Westminster Hall. Willes always wore his ribbons crossed over his white bands in a comely fashion, and thence passed behind his back under the gown, and tied round his waist. His language was quaint and formal, and as he spoke he chewed his lips, as if what was in him was of so much value that his mouth reluctantly allowed it to pass.

He looked a pedant, but he was not. When he came to sum-up at Nisi Prius, he showed all the aptitude and acuteness of a man of the world. His sternness, too, was only outside. The day before his melancholy death, which cut short a great and useful career, he

was engaged in writing to recommend to mercy a man he had sentenced, because he was young and a sailor.

The prodigious learning which Willes possessed was only attainable by a lifetime of hard work. It began at Trinity College, Dublin, for Willes belonged to that large family of successful men who are born in Ireland of English extraction, and who, like East India sherry, would seem to come back all the better for having crossed the sea. It continued when he came to London and worked in the chambers of Tom Chitty, the pleader. He made himself so useful that Chitty hired him as his assistant at a salary, as Campbell was hired by Tidd. Willes is reported at this time to have sat up half the night reading, with wet towels round his head to keep himself awake, according to the plan which the excellent Lord Hale commended to young lawyers. In the grey morning, he would take constitutional exercise round the Temple Gardens, where he would meet, bent on the same errand, John William Smith, a very learned lawyer, and the best of the text-book

writers of the day. From the intimacy thus begun, it came about that Willes became editor of Smith's "Leading Cases" in conjunction with Keating, another successful Irish reimportation, who afterwards sat beside him on the Bench. In Chitty's chambers Willes learned much more than Chitty could teach him, and, in fact, fathomed all the mysteries of special pleading, or the art of conducting actions out of Court, and gained a reputation for skill and profundity in this branch of knowledge which led to his being appointed a member of the Common Law Procedure Commission, and eventually to the Bench. One of Chitty's sons married Willes's sister.

He was not free from the domestic eccentricities which affect profoundly learned men. A conveyancer is said to have one day married a wife, and after the ceremony to have begged leave to go to Lincoln's Inn on pressing business. Arrived there, he straightway forgot the happy event of the day, and becoming immersed in a peculiar complication of contingent remainders, did not arrive home till early next morning, to the alarm of the deserted bride.

Willes, in the days of his youth, before Littleton and Sheppard had absorbed his romance, fell in love with a lady at Cork, where his father lived. They were engaged to be married when he went to London to seek his fortune. But learning was not highly remunerated, and it was out of the question that a poor special pleader should marry. Willes joined the Home Circuit, and his name began to be known; but when it was suggested from Ireland that he must be rich enough to marry, Willes was unable to agree. Even when he was appointed a member of the Commission, this was rather a tax on his time than a source of income. At last Willes was made a judge. Now, the salary of a judge can be learned from an almanac, and it must be confessed that, though not princely, it is enough to keep a wife upon. Willes had no longer the excuse of poverty. As a lawyer he knew the force of a contract, while a judge could hardly stand the brunt of an action for breach of promise of marriage. This is the tale accredited among lawyers of such romance as there was in Willes's life.

Willes earned his judgeship in the Common Law Procedure Commission and in drafting the Acts which they recommended. What was wanted was some one to bring to the light of day all the chicanery of the ancient system. An adept in that art of special pleading which made clients the sport of the lawyers, so that success turned less on the justice of the cause than on the adroitness with which it was handled, Willes, by substituting a new system, destroyed the source of his gains, and therefore was entitled to the compensation of a seat on the Bench, which he received from Lord Cranworth at the age of forty-one. With the help of Bramwell, he succeeded in drafting the Acts which for twenty years governed the practice of those Courts.

A simpler, better, and more logical system was probably never invented; but nowadays few legal institutions last long. The common law procedure having been purified by itself in one flagon, and the Chancery procedure in another, it became necessary to pour one into the other, in order that both law and equity,

and the proceedings in both sets of Courts, might be one. It so happened that those to whose hands the task fell were equity lawyers, and the Chancery flagon was chosen to hold both. The result is that diffuseness and irrelevancy reign, and the pleadings on each side are no longer a neat and logical statement of material facts and those only on which the law allows reliance to be placed.

Willes, however, did not live to see this change. He sat in the Common Pleas as the right hand of Erle and Bovill, and with Keating, his early fellow-labourer, by his side. He was among the first of the judges who tried election petitions under Disraeli's Act, and he did the work with an aptness of definition and a justness in the application of principles which laid a good foundation for his successors. His unrivalled reputation for learning, his freedom from prejudice, and his logical force made his decisions in all branches of the law always respected and seldom questioned. He attained the honours of a Privy Councillor much coveted by puisne judges. Sixteen years on the Bench had given him a ripe experience;

but he was not yet sixty years old, and many more years of usefulness and celebrity were before him, when suddenly it was announced that he had met his death by his own hand.

Willes had returned from the Summer Assizes on the Northern Circuit of 1872, rather overtasked by the work which he had gone through, and he retired to his home at Otterspool, near Watford. He tried to invigorate himself with exercise, and the day before his death had been boating on the Colne, which skirts the garden of the house. The only distraction he could find was to read German. His clerk, who had been invited to stay with him, found that he suffered more than usually from absence of mind, and there was a strangeness in his manner. In the early morning of October 1, 1872, he was found in his dressing-room shot through the heart with a pistol which was lying beside him.

The doctor who attended him, and saw him the day before, was, besides the clerk, the only witness called at the inquest. He said that the judge was always of a weak constitution, and latterly suffered from gout, which affected

the heart, and which, from his manner on that day, had apparently touched the brain; and the jury found that he had shot himself while not of sound mind.

There were still ingenious persons who thought that a mystery hung over the death of Willes; not that he did not commit suicide, but that there was a direct cause for his death. These reasoners put their finger on a passage in the evidence of the clerk, that he heard a "fall and a scream" from the judge's room. Upon this single fact misplaced acuteness fastened, but persons of sobriety of mind saw in the death of Willes only the collapse of a great intellect, due to life-long devotion to study.

Any fine-spun theories suggested by his death were forgotten in the deep regret at the premature loss of a man of whom every one was proud. The cases which he decided range over every branch of the common law. One of his decisions which, in days of crowded life, has had a widespread effect, was *Indermaur* v. *Dames*, a case in which he held the proprietor of premises concealing a danger in the nature of a trap, such as the unfenced well

of a lift, liable in damages for the injury of any person who comes upon them by his invitation. He was fond of illuminating his judgments by references to the older authorities; and in imposing liability for mischief to game upon the owner of a dog who was a confirmed poacher, he brought to light from the Year-books an authority of the reign of Edward IV.

His opinion, prepared for the benefit of the House of Lords, to the effect that the Mayor's Court of London is an inferior Court, is a monument of research and learning.

One innovation introduced by Willes seriously affected the habits of lawyers. He was one of the first of the judges to live out of town, and the consequence was that the Court of Common Pleas could not be formed till half-past ten o'clock, instead of ten, as theretofore. The other Courts at Westminster gradually followed suit; and when law and equity were fused, the common law, contrary to all precedent, and not the equitable rule of early to work, prevailed, and now all the Courts sit at half-past ten.

In the case of *Berry* v. *Da Costa*, Willes laid down the rule of damages which has governed ever since in actions for breach of promise of marriage aggravated by seduction. The jury may compensate for the loss of the prospect of marrying and for the mortification to the feelings brought about by the seduction as well as for the loss of the match. In dismissing the question whether women could vote, Willes said that "it would be quite inconsistent with one of the glories of our civilization, the respect and honour in which women are held," and cited Littleton, Selden, and Lambard.

In the midst of the busy and exhausting labour of modern times at the Bar and on the Bench, Willes was an example of profound learning which would have done credit to a more studious and leisurely age.

BYLES.

1858–1873.

BYLES was a most successful advocate at the Bar, a learned lawyer as barrister and judge, and a conspicuous authority on one branch of legal study. "Byles on Bills" for accuracy and clearness is among the best law books in the English language. Lawyers and judges have for years turned to it for information with absolute confidence. It is not too much to say that without it the late codification of the law of bills of exchange would have been impossible.

Byles took an interest in this book up to a very few weeks of his death. A question whether its copyright had not been infringed was referred to him to decide whether any and what proceedings should be taken. The

matter was amicably arranged, but the incident is curious, as showing that one of his last acts was in vindication of the book which in the future will be his chief title to fame.

Byles was thirty years of age before he was called to the Bar, and up to that he had been in business. His business experiences, perhaps, suggested to him the production of a book on one of the most important branches of commercial law. The success of the book still further determined the bent of his legal studies and practice. He became a good commercial lawyer, but he never gained any great reputation in other branches of the law, although in all he did he was famous for his practical shrewdness and common sense. His mind wanted that breadth and clearsightedness which are essential to the intellectual equipment of a great lawyer, who is to lay down propositions of universal application. He will never take the place filled by James, Willes, or Jessel; but will always be known as Byles on Bills, a result to which the "artful aid" of alliteration conduces.

Byles belonged to a school of lawyers which

has now long disappeared. He was old enough to have been Queen's Serjeant, and to have sat in the Court of Common Pleas as one of the privileged few who had audience there. He lived in the days of special pleading, when adroitness in manœuvring won cases oftener than the merits of the case. Practitioners of to-day sometimes express wonder how any one could have gone to law in those days only to see the issue turn on some unintelligible technicality; but the fact is that men then, as now, went to law, except when reputation might be concerned, mainly for the excitement of the contest and the prestige of winning. They did not care how they beat their adversary so long as they beat him. In this kind of warfare Byles was thoroughly at home.

Instances of his astuteness in advocacy were numerous. His mode of winning cases was not by carrying juries with him in a storm of eloquence, or cross-examining witnesses out of Court, but by discovering the weak point in his adversary's case and tripping him up, or by the nice conduct of such

resources as his own case possessed. Once he was for the defendant in an action for breach of promise of marriage. The plaintiff proved the promise to marry, and that the defendant had married some one else. The case seemed a question of damages, but Byles put two questions to the plaintiff: "Did not he promise to marry you when his father was dead?" "Yes." "Is his father dead?" "No." "That is my case, my lord," said Byles. "But, brother Byles," said the judge, "he has married some one else!" "Well, my lord," said Byles, "his wife may die before his father, or afterwards, and he may outlive them both, when it will be time to fulfil the promise." The plaintiff had, in fact, alleged in his pleadings an absolute promise, and the proof of a conditional promise was what was called a fatal variance, which could not be amended. Some years afterwards a similar case from the Oxford Circuit came before the Court of Queen's Bench, when, in happier legal times, the defendant was not so fortunate. It was held that by marrying again he repudiated the whole engagement, so that the plaintiff

need not await the fulfilment of the condition, but might sue at once. On another occasion he was retained for the defendant with Mr. (afterwards Mr. Justice) Willes, whom he led at the Bar, but who was afterwards his senior in the Court of Common Pleas, in a case of some complication tried before Chief Justice Jervis. At the end of the day (Saturday), Mr. Byles submitted that there was no case, and the judge rose to give his decision next week. In the interval, Willes asked Byles why he did not take a particular point which both had agreed in consultation to be fatal to the plaintiff's case. "I left that to the Chief Justice," said Byles; "I led up to it, and walked round it, so that he cannot miss it, but if I had taken it he would have decided against us at once." And so it proved, for on Monday morning the Chief Justice gave an elaborate judgment overruling all the points taken on both sides, but nonsuiting the plaintiff on a ground which, he said, he was astonished to find had not been taken by either of the very learned counsel for the defendant, but which, in his opinion, was conclusive.

In another case Byles was for the plaintiff, and Edwin James for the defendant in an action on a bond tried before Chief Justice Tindal. Byles was a long time in opening his case and examining his witnesses, until the Chief Justice became restless. Still more restless was Edwin James, who wanted to go elsewhere. Byles, seeing his impatience, whispered to him, "Give me judgment for the principal, and I will let you off the interest." Accordingly a verdict was taken for the plaintiff for the amount of the bond without interest. Afterwards Edwin James asked Byles why he had foregone the interest. "You need only have put in the bond," said he, "and you would have had both." "That was just the difficulty," said Byles, "the bond was not in Court." In those days adjournments were not so easily granted as now, and in any case the costs of the day would have exceeded the interest.

Another example of his skill in the art of making concessions occurred in a case in which he was opposed to Cockburn. Byles was for the plaintiff in an action of debt

brought against a person who was said to be a lunatic. Cockburn proceeded to cross-examine the plaintiff to show the defendant's insanity, whereupon Byles politely interposed, and said that he would save his learned friend the trouble of cross-examining on this point, and would admit the lunacy of the defendant. Upon that, Cockburn sat down. When the evidence was closed, and Byles addressed the jury, he claimed and obtained the verdict on the ground that no doubt the defendant was insane, but it had not been shown that the plaintiff knew it. Byles, however, did not retain this verdict, and at the hearing of the motion for a new trial, when it was set aside, Cockburn read from his brief the note he had made in the margin opposite Byles's admission. It was this: "Why this candour in brother Byles?" The trap was suspected, but not seen in time.

A reputation for successes like these made Byles a formidable adversary. On one occasion at Norwich he had for an opponent a counsel whose strong point was advocacy rather than law. Byles, who was for the

defendant, went into Court before the judge sat, and in the presence of his opponent he called to his clerk, "What time does the mid-day train leave for London?" "Half-past twelve, sir." "Then, mind you have everything ready; and meet me in good time at my lodgings." "But, serjeant," said the plaintiff's counsel, "this is a long case; it will last at least all day." "A long case!" said Byles; "it will not last long; you are going to be non-suited." The advocate, who stood much in awe of his opponent's legal skill and knowledge, spoke to his client. The result was that the case was settled for a moderate sum, and Byles caught his train.

In several of the stories told of Byles when at the Bar and on the Bench his horse figures conspicuously. When he was at the Bar, he had a horse, or rather a pony, which used to arrive at King's Bench Walk every afternoon at three o'clock. Whatever his engagements, Mr. Byles would manage by hook or by crook to take a ride, generally to the Regent's Park and back, on this animal, the sorry appearance of which was the amusement

of the Temple. This horse was sometimes called "Bills," to give opportunity for the combination "there goes Byles on Bills;" but if tradition is to be believed, this was not the name by which its master knew it. He, or he and his clerk between them, called the horse "Business;" and when a too-curious client asked where the serjeant was, the clerk answered with a clear conscience that he was "out on Business."

When on the Bench, Mr. Justice Byles's taste in horse-flesh does not seem to have improved. It is related of him that in an argument upon section 17 of the Statute of Frauds, he put a case by way of illustration to the counsel arguing. "Suppose, Mr. So-and-so," he said, "that I were to agree to sell you my horse, do you mean to say that I could not recover the price unless"—and so on. The illustration was so pointed that there was no way out of it but to say, "My lord, the section applies only to things of the value of ten pounds," a retort which all who had ever seen the horse thoroughly appreciated.

Byles was a strong Tory (he once wrote a

book on "The Sophisms of Free Trade"), and he had a horror of Judicature Acts, the fusion of law and equity, and other innovations which were floating in the air in 1873. He declared that he would not remain an hour longer on the Bench than his fifteen years. On the first day of Hilary Term, 1858, he took his seat on the Bench of the Court of Common Pleas, and on the first day of Hilary Term, 1873, his resignation arrived, and he retired to enjoy his ease and the considerable fortune which he had amassed. The time was inconvenient for the appointment of a new judge, but the judge could not resign before, and he would not wait a moment after. His acuteness and homely sense often took a humorous turn. Once when he was trying a prisoner for stealing, a medical witness was called, who said that in his opinion the accused was suffering from kleptomania, "and your lordship, of course, knows what that is." "Yes," said Byles quietly, "it is what I am sent here to cure." He performed his judicial work with great conscientiousness, and in his latter days, when he fell into the last stage which ends the

history, he was sometimes troubled with the idea that he would have to sum up to a grand jury or go to Guildhall next morning, and was not prepared. When these fits were on him he would fight his battles over again, as if he were still in his place on the Bench. He lived ten years after his retirement in peace and quiet at his house near Uxbridge, with an occasional visit to London to sit on the Judicial Committee. He amused his last days with theology, and wrote a religious book; and when he died he left a fortune of more than £200,000. His name is not connected with many great decisions, but he tried the Rev. Mr. Watson, the clergyman and schoolmaster who murdered his wife, and whose sentence was commuted on the ground of insanity. At the beginning of the trial a juryman ventured to express the hope that the case would be made as short as possible. Byles sternly rebuked such a request at a time when the prisoner's life was at stake. Mr. Denman, who prosecuted, informed the juror that the judge was least likely to waste time, as he wrote shorthand.

He took a very characteristic part in the decision of *Chorlton* v. *Lings*, in which it was held that women did not obtain Parliamentary votes by the Representation of the People Act, 1867, in virtue of the new franchise conferred on "every man." His judgment is an example of his quaint and old-fashioned judicial style. "No doubt," he says, "the word 'man' in a scientific treatise on zoology or fossil organic remains would include men, women, and children, as constituting the highest order of vertebrate animals. It is also used in an abstract and general sense in philosophical or religious disquisitions. But in almost every other connection the word 'man' is used in contradistinction to 'woman.' . . . Women for centuries have always been considered legally incapable of voting for members of Parliament, as much so as of being themselves elected to serve as members. In addition to all which, we have the unanimous decision of the Scotch judges. And I trust their unanimous decision and our unanimous decision will for ever exorcise and lay this ghost of a doubt, which ought never to have arisen."

MARTIN.

1850–1874.

MARTIN on the Bench was like a rough and healthy breeze in an overladen atmosphere. His personality did not, as is often the case with judges when they retire, begin quickly to fade. His strongly marked individuality, impressed by long service, lingers in the memory in a manner not quickly erased. He was twenty-three years one of the expiring race of barons of the Exchequer; and he possessed a character which would have been prominent in any station of life, and which, from his having so little of the conventional judge about him, made him a very marked figure on the Bench.

A large-framed, carelessly dressed man, speaking plain common sense in homely language, and with a brogue which he would

have thought it affectation to conceal, he appeared before the world, whether at the Bar or on the Bench, just as he was. He had no pretension to the arts of advocacy at the Bar, and he was a man of little learning; but the secret of his success, both as judge and advocate, was such as to make him a genius in his way. He had a marvellous instinct for what was the right thing to be done. This, added to his plain directness of speech and manner, little like the usual circumlocution of lawyers, was the cause of his success in commercial cases on the Northern Circuit, and of the value placed on his opinion when on the Bench. The only favour he obtained at the Bar was from his marriage with the daughter of Chief Baron Pollock. Pollock was supposed to show his partiality in an obvious manner. On one occasion Martin was for the Crown against Thesiger (afterwards Lord Chelmsford) for the defendant in an action tried before Pollock. In the course of the case, Thesiger rose and declared with warmth that it was impossible for counsel to do his duty in that Court when he had Mr. Martin as his opponent.

Martin may have been wrong in the way in which he did things; but he was seldom wrong in the result. One of the numerous stories told of him well illustrates this felicity of his. At the Guildford Assizes, an action came before him in which the plaintiff sued a railway company for damages caused by a mob on a crowded platform pushing him against the train. The learned baron, whose conscience sometimes pricked him in that he visited the racecourse perhaps a little oftener than a judge should, explained to the jury that the same thing happened to him every year at the Victoria Station on his way to the Derby, and added, "I never think of bringing an action, gentlemen; it serves me right, as I have no business there." The nonsuit which he thereupon directed was set aside by the Court in Banco without any difficulty; but, when the case came on for trial a second time, Mr. Justice Brett presiding, the jury found for the defendants—so that the learned baron was right in the long run.

A deeper prescience seems to have dictated his manner of treating a railway company

which pleaded to an action for the loss of cattle that "they were carried at owner's risk for less freight." "You had the man's money," he would say, "and you killed his beasts; why don't you pay him for them like honest men?" This was, at the time, bad law, if sound morality; and it was not until a few months before his death that the Court of Appeal decided, in *Brown* v. *The Manchester, Sheffield, and Lincolnshire Railway Company*, that the offer of an alternative rate does not necessarily make the condition to exempt from liability reasonable, as the statute requires it to be.

Martin's breadth of view verged sometimes on the grotesque when carried into the small details of practice. He not infrequently sat at Judges' Chambers, and on one occasion he was asked to make an order for interrogatories, which in those days was always necessary in the common law courts. "How many are there?" asked the baron, without looking at them. "Twenty," was the reply. "I shan't make an order for a man to answer twenty interrogatories," rejoined the judge. "You

may ask him half a dozen, and take which you please."

In more important matters his insight into equity often led him right when others went astray. In *Smyth* v. *North*, Barons Martin and Pigott, notwithstanding the dissent of Baron Bramwell, held the view, which is now considered orthodox, that the word "surrender" in regard to the disclaimer of leases under the Bankruptcy Act has a sense of its own and not the legal sense.

On occasion he would prefer his native knowledge of law even to the express terms of an Act of Parliament. On his last Circuit at Lewes, a partner was committed for trial for stealing partnership money. In charging the grand jury, Martin told them to throw out the bill. "Whoever heard," he asked, "of a man stealing his own money? It cannot be, gentlemen." The clerk of arraigns stood on his seat to hand up the judge the Act of Parliament making it a felony to steal partnership money, but Martin would not pay any attention. "Never mind the Act of Parliament, Mr. Avory; take it away. The man who

drew that Act knew nothing about the law of England."

He was plain and direct in his speech, and disliked anything like beating about the bush. Once at Nisi Prius, in an action for breach of promise of marriage, the plaintiff's counsel was examining the plaintiff with rather an excess of preliminaries as "How long have you known the defendant?" and so on. Martin became impatient, and took the witness in hand. "Listen to me, young woman. Now, did this young fellow promise to marry you?" "Yes, my lord, he did." "Has he married you?" "No, my lord, he has not." "Has he refused to marry you?" "Yes, my lord, he has." "There, Mr. Silverlip, what more do you want? That's your case, isn't it?"

Martin, sound though his decisions usually were, did not leave his mark on the reports, for the reason that his type of mind was not of the analytical order. He could hit the mark himself; but he could not show others by what process he did it. He rather despised displays of intellect and of learning. Neither

was he ashamed of a want of literary culture. On one occasion, in a real property case, a very learned counsel referred to the laws of Howel Dha. "I don't believe there was such a mon," said the baron.

The story goes that on another occasion, on Circuit, his brother judge was detained in Court beyond the dinner-hour. Martin found a Shakespeare which the other judge had left on the table, and took it up as he might the latest novel. His learned brother, coming in, exclaimed, "Why, Martin, I had no idea you were a student of Shakespeare!" "Well, no," replied the baron, "I never read him before, but I have been reading him for the last twenty minutes, and from what I have seen of him, I think him a very overrated mon"—an expression of opinion which has, perhaps, been attributed to others.

So, again, at the Hampshire Assizes, he dined with the Warden of Winchester. After the judge had gone, the warden remarked to the guests left behind, "What an agreeable man Baron Martin is; but for a judge, how ignorant! Why, he had never heard of

William of Wykeham!" Tradition, however, records that at that very moment the judge was having his revenge. On entering his carriage, he said to his marshal, "I like that warden; but for a person of education, he is about the most ignorant I ever met. He did not know where Danebury was, and had never heard of John Day's training stables."

Rumour, indeed, always asserted—and, in spite of positive assurances to the contrary, tradition will continue to assert—that Martin was part owner, with the late Mr. Henry Hill, of some racehorses; that he consulted that gentleman as to the advisability of accepting a judgeship; and that the acceptance of the office involved the painful necessity of parting with them. It is matter of undoubted history that the baron made a point of being present at Epsom on the Derby Day, and could be seen in the Stand just over the weighing-room in conversation with Admiral Rous, Mr. George Payne, Count (afterwards Prince) Batthyany, and other turf celebrities, and at another moment in the enclosure earnestly contemplating the winner side by side with Mr. Hill,

Mr. Gully, Mr. Padwick, and John Day. After his retirement from the Bench he was elected an honorary member of the Jockey Club—an honour which he much prized.

Whether or not Martin ever had a proprietary interest on the turf, his mind was always very full of horses, dogs, and other animals, to all of which he was devoted. If an illustration came from him in Banco, it was tolerably sure to begin, "Suppose I bought a horse."

When he went the Oxford Circuit, he was taken to the Malvern Hills, with a view to the scenery. He was asked his opinion of the hills; whereupon, digging his heel into the turf in a scientific manner, he replied, "Well, they would make a capital racecourse if they were levelled." The only known attempt made to bribe the learned judge proceeded from a prisoner who must have had an inkling of his tastes. He was convicted, and on being called upon before sentence, he said, "I hope your lordship will not be hard upon me; and perhaps your lordship would accept a beautiful game-cock I have at home." The judge put

his hand before his mouth to hide his laughter; and then passed a sentence which was not severe, adding, "Mind, you must not send me that game-cock."

He once, at a judges' dinner to the Bar on Circuit, called across the table to his colleague, "Brother Willes, are pigs within the Wounding Act? Are they 'cattle'?" Mr. Justice Willes stroked his chin, and said, "I think, brother, there is a passage in Justinian which seems to point in that direction." Kindness to animals Baron Martin shared with many other occupants of the Bench.

If these stories are not more than enough, there is one which suggests the key to Sir Samuel Martin's whole character. He asked a young lawyer how he progressed in his law, and was told that its complications were puzzling. "Nonsense!" said Baron Martin; "bring your common sense to bear on it, mon. That's what I always do; and I generally find I'm right."

His ready wit sometimes extricated him in an unexpected way from the mazes of subtlety which are thrown round questions

at the Bar. Thus he was sitting in Banco, with Baron Bramwell by his side, in the little room up many stairs, known as the second Vice-Chancellor's Court at Westminster, now happily among the Courts abandoned, while a long-winded counsel was "distinguishing" the case before them from a decision of the House of Lords. After painfully enduring the operation for some time, the baron said, "You are very much mistaken, if you think that my brother Bramwell and I, sitting in this cock-loft, are going to overrule the House of Lords."

His sentences on malefactors, like his judgments, were short. "You are an old villain, and you'll just take ten years' penal servitude," was quite enough for the confirmed sinner convicted for the tenth time of felony. In a prolix age his brevity was refreshing; and if his mode of cutting knots instead of untying them prevented his elucidating the law, it at least tended to the despatch of business.

In his total absence of affectation, sometimes approaching a want of dignity, he was free from another of the smaller vices of the day.

On a summer circuit when the weather was very hot, Baron Martin not only took off his wig and robes, but, finding the cushion of his chair too warm, ordered something cooler to put on it, and sat on a soap-box.

In his combination of tenderness and robustness, and in other ways, he was not unlike Dr. Johnson, but without the learning and rhetorical power of his great namesake. He inspired all who knew him with affection; and, although not a great lawyer, he must be reckoned an admirable judge.

JAMES AND MELLISH.

1869–1881.

JAMES AND MELLISH are names associated in legal history with the last days of the Court of Appeal in Chancery and the earliest of the Court of Appeal as now established. The Court of Appeal in Chancery was constituted, in 1854, of two Lords Justices, with the occasional assistance of the Lord Chancellor, and although it lasted for but twenty-one years, it hardly had a weak judge. There were giants on the Bench in those days. Turner, Knight-Bruce, Rolt, Cairns, Selwyn, Wood, and Giffard gave place to James and Mellish, who belonged to the transition period, and who were eventually absorbed in the six ordinary Judges of Appeal now substituted for the Lords Justices. This Court seldom sits less than three strong; but James and

Mellish, although one was bred in equity and the other at common law, generally sat without a third, and hardly ever differed. The new system under the Judicature Acts, which James, as an advanced legal reformer and member of the Commission, was instrumental in introducing, was thoroughly congenial to his taste, and he did much to make it take root.

The death of James, by far the greater of the two, was a public loss. He was a judge of the best class—a class which, unfortunately, by reason of the conditions upon which judges are made, is never very numerous. There are frequently on the Bench men as highly gifted as he, and as highly cultivated; but it is a common observation of judges thus qualified, that they would appear to have applied their talents to almost every branch of knowledge except the science of law. There are often men with as much learning as James to be found among the judges, but they are too frequently mere lawyers, whose lightest reading, like that of the late Mr. Justice Willes, is Butler's "Hudibras."

James was a man of great powers of in-

tellect widely applied, but concentrated on the law. He did not, like some judges who have been placed in eminent positions on the Bench, look upon his duties as a somewhat tiresome necessity of his situation, or as ground upon which he must tread warily through consciousness of great gaps in legal knowledge or want of sympathy with legal modes of thought. He loved the law, and he was confident of his legal powers. He applied a considerable knowledge of life, great force of expression, and a vivid imagination to the illustration of the subject in which he was entitled to have a voice. Few judges have been so thoroughly imbued with the great first principle, from which there are on the Bench so many temptations to depart, especially in days when public opinion acts even upon the administration of law, that law is essentially a science of general application, and not a patchwork to be made up piece by piece as occasion arises. A judge of this character fills satisfactorily the position in the social economy to which he is called, and is not easily replaced.

James, apart from the question of his health,

which was less robust than his appearance, never had a chance of being Lord Chancellor. Although holding strong opinions as a Liberal, he was not fit for the dust and drudgery of the political arena through which by the British constitution a man must pass triumphantly before he can look forward to the highest judicial offices. Some men, like Lord Cairns, pass through the ordeal, and bring on the woolsack all the weighty qualifications which ought to be possessed by a Lord Chancellor of Great Britain; but many fully qualified for the office shrink from passing the portals, or, like James, fail in the attempt. If he had succeeded at Derby, he would have overcome the difficulties which beset lawyers in the House of Commons, and would have made his mark in politics. His interesting book on the history of the British in India, published after his death, breathes the true spirit of an enlightened and patriotic Englishman.

James, as a Welshman, came from a good judicial source, and his Scotch education probably helped to give his mind the philosophical turn which it possessed. As a Unitarian he

was unable to enter an English University. He was trained as a lawyer in the chambers of Chief Baron Kelly—a good school, in which Lord Bramwell was educated, and which, through him, now influences some of the judges and many barristers—and in his early days of practice did not confine himself to equity, but attended the Great Welsh Sessions, which then administered both law and equity. The solid merits of Mr. James were some time in coming to the front. He was a stuff gownsman for twenty-two years, and it was sixteen years before he became a judge. He was taken up, however, by those capable of estimating the less showy qualities in a barrister, and became Attorney-General's "devil" in Chancery, and standing counsel to some of the Government offices. He was appointed Vice-Chancellor of the County Palatine of Lancaster and Queen's Counsel in the same year.

A want of fluency in speaking, and a candour of mind which denied him the advocate's faculty of seeing only one side at a time, impeded his success at the Bar. Those who

heard him on the Bench, and even more those who read his judgments, were surprised to be told of his want of success as an advocate. But, in fact, in speaking, as has been said of others, he was like a man who is choosing among a bundle of sticks for the proved weapon, and who always finds the right one, and he was not an orator capable of carrying an audience away with him. His critics might have said of him that he was a judge at the Bar and an advocate on the Bench, so forcible and imaginative are some of his judgments.

Probably he was sometimes carried beyond the bounds of the strictest judicial propriety by an indulgence in the power of stinging language, of which he was a master. A good example of his judicial style is supplied by a passage from a judgment of his, in which Mellish concurred, in the case of *The Canadian Oil Works Company*:—

"It appears that there were some gentlemen who were minded to induce the English public to buy some property, some oil wells and plant, in Canada, for a very large sum of money,

which could only be done by means of a joint stock company. In this state of things, these gentlemen apply to a body of English gentlemen of position, and they say to those English gentlemen, 'Pretend to be shareholders in a company. Pretend to be promoters. Pretend to have made a contract with us, and invite the world to join you as shareholders, and invite them to believe that you are the promoters, and to participate with you in the contract which you will pretend you have made. We will find you the shares. We will be the promoters. We will indemnify you against all the expenses. We will have the contract, made by ourselves, cut and dried, ready for signature; and we will give you a part of the purchase money which we are to receive in money or in shares; and besides that, you will have your profits as directors of this company.' And that body of English gentlemen have consented and condescended to become the hired retainers, upon those terms, of some unknown adventurers from the other side of the Atlantic."

Another example showing his high ideal of

fairness between man and man may be taken from his judgment, in which Mellish silently joined, in *Hodgkinson* v. *Crowe*, in which the question was whether a forfeiture on the breach of any of the covenants in a mining lease was a usual clause :—

"I am bound to say, having had some experience in these cases, that I not only do not consider it a proper and reasonable thing to introduce, but to my mind it is a most odious stipulation; it is offensive and it is oppressive beyond measure, and it never, in my opinion, has been submitted to by lessees except upon a general notion that lessors are men of honour and liberality, and would not incur the odium which they would incur in the eyes of their neighbours if they endeavoured to enforce that which is their strict right, a course which might have the effect of producing a forfeiture of a valuable estate, in which the whole of a lessee's fortune might have been embarked, through some casual inadvertence which might produce a breach of the covenants, though it might not have done the lessor a shilling's-worth of damage."

His judgments, from the very causes which have sometimes subjected them to criticism, cling to the memory, and have become incorporated in legal literature. His reply in *Ex parte Saffery* to the claim of the Stock Exchange to be a law to themselves has become history. "My answer is," said the Lord Justice, "that the Stock Exchange is not an Alsatia. The Queen's law is paramount there, and the Queen's writ runs even into the sacred precincts of Capel Court."

Equally expressive was his scriptural parallel for lawyers who pile up costs and lengthen documents in spite of Statutes and Rules. When a remarkable instance of this kind came before the Court, James said, "These men, the sons of Zeruiah, are too hard for me." In a case in which it was contended before him that a man who sold the goodwill of his business and afterwards canvassed the customers for himself was not liable to an injunction, he said, "'Thou shalt not steal' is as much a part of equity as it is of common law."

The branches of law in which he made the

largest contributions to the stock of English jurisprudence were company law, in which the introduction of the Joint Stock Companies' Acts gave him an opportunity ; bankruptcy law, in which his grasp of detail without loss of the general principles of justice was conspicuous ; and in patent law. In ecclesiastical law, in which his authority was often invoked at the bar, he had some few opportunities of displaying his knowledge on the Bench. He touched no branch of law without enriching it, and every day's experience in the Courts shows that his judgments are more trusted to illuminate obscure matters than those of any of his contemporaries.

Although possessing a full acquaintance with case law, no judge set his face so strongly as James against the practice, from which equity jurisprudence has suffered so much, of deciding according as half a dozen previous cases, none of them directly in point, seem to suggest. James, in fact, although no judge was more full in giving his reasons and dealing with all the arguments advanced, arrived at his conclusion instinctively.

His habit of making up his mind early in the argument led to a noticeable judicial fault. So soon as he had made up his mind, he was apt to be impatient to deliver himself of it; and it was sometimes difficult for those whose duty it was to oppose his view to get a further hearing. James seemed to throw himself on the disputant with an intellectual weight which had a smothering effect, typified by his own physical appearance and manner.

Such faults as a tendency to over-colouring in language, due to a strong imagination, and an occasional liability to impatience of argument, due to a desire to save public time, were largely outweighed by the Lord Justice's judicial excellencies. Few judges were more honest than he on the Bench. Moral honesty is happily common to all, but he had the rarer virtue of intellectual honesty. He never sought to get rid of a case upon some trifling technicality, but, if possible, pronounced on the merits. The phrase "unnecessary to decide" was seldom in his mouth; and, conscious of his own powers, he went out of his way to untie judicial knots. His name

will be added to legal history as that of an intellectual Titan who did much to give breadth, strength, and uniformity to the system of English jurisprudence.

No two judges were more unlike in person than James and his colleague for five years on the Bench of the Court of Appeal in Chancery, Lord Justice Mellish. There is a sketch in Hood's Annual of "a great judge and a little judge, the judges of Assize," the point of which is that they are far from being of a size. The proportions of Hood's two judges would exactly fit the case of James and Mellish. Upon the first day of Michaelmas Term the Lords Justices wear their full dress robes which, by a modification of the Chancellor's, are of black silk, thickly laced with gold. So narrow were the shoulders of Mellish that his robes sat on him as on a towel-horse, and so little of the gold was visible that they might have been all black. On the other hand, the ample shoulders of James made a blazing display, so that the disrespectful were apt to compare him to a gorgeous frog, while another illus-

tration from the animal kingdom likened his colleague to an obscure lizard.

With still more irreverence, the profane vulgar, frequenting the Court during the daily association of the two Lords Justices and their rapid disposal of the business, gave them the nickname of "Flames and Hellish." There was a flamboyant appearance about James's figure and face which made the corruption of his name, though coarse, not very wide of the mark. The unpardonable liberty taken with Mellish's name was aggravated rather than excused by his supposed tendency to irritability produced by the constant physical pain from which he suffered, and which he found it impossible always to repress.

James's opinion of his colleague, delivered at the sitting of the Court after his death, was given in the following words :—

"What he was at the Bar and on the Bench, is known to the profession, and to the suitors, and will long be remembered; but to no man was his judicial character so known as it was to me, who, for so many years, had the inestimable advantage and privilege of sitting

by his side in the old Court of Appeal, and working with him during all that time in the most unreserved intimacy and confidence. During that time I have seen him sitting by my side writing, under the painful disease by which he had been racked from his early youth, and subduing a pain, to which, any other man would have succumbed, by his strong will and his resolute determination to do his duty. And yet he continued to apply his powerful and clear intellect and the unrivalled stores of his legal learning to ascertain the truth, to maintain the law, and to do right and justice to all manner of men. That was the single-minded object of his judicial life, which was as free from vanity and caprice as it was from prejudice, passion, or partiality. With it all there was that marvellous sweetness of temper which was never disturbed or altered. Day by day I learnt to look upon him more and more with an admiration which was only equalled by the love with which he inspired me, and by the regret with which I now pay this truthful tribute to a very great and a very good judge."

Panegyrics by judges on their deceased brethren are generally little worth citing. They sound too much like "another great man dead; it may be my turn next," but this was one of the things which James did well, and the passage illustrates both the speaker and his subject. The physical infirmity to which James referred was an affection of gout visibly developed in Mellish's hands, so that writing was a painful process, subjecting him to a torture which made the hearing and deciding of perplexing legal questions with unruffled temper almost heroic.

Mellish was the son of a Dean of Hereford, and went to Eton, where he distinguished himself in "Pop," and to Oxford. In his young days he was an oarsman. His education was of a kind which produces an English gentleman and a scholar.

At the Bar his dexterity in arguing a demurrer, a special case, or a rule nisi in Banco was remarkable. His acute and subtle intellect seized the point at once, and presented it in the manner most favourable to his client. He was above all things a special

pleader, a branch of practice in which he had been actively engaged for the first eight years of his professional life. Yet with all his subtlety, dialectic skill, and casuistic force, Mellish was always fair, honest, and straightforward. He could play the forensic game against any man; but he played it always like a man and a gentleman.

He was the beau ideal of a Court of Appeal judge. He lacked some of the qualities essential to a judge "of all work," but was without none of those of an appellate judge. Unlike James, who was a Vice-Chancellor before he was a Lord Justice, he wisely declined to be a judge of first instance, but accepted a seat by the side of his illustrious friend and colleague.

Mellish had no moral drawbacks to the judicial character. His mind was well poised, he was altogether free from conceit and passion. He preserved an equable, unruffled temper, and a courteous, tranquil, and easy manner. His strong will subdued his physical infirmity and every other force antagonistic to the full play of his great moral and intel-

lectual powers. To him death was rather a release from suffering than an end of worldly happiness. His memory will always be coupled with that of James, who was a man of equal intellectual force, but more capable of impressing his personality on his contemporaries and on history.

THESIGER.

1877–1880.

A MAN who is a Judge of Appeal at thirty-nine and dies at forty-two is necessarily an interesting figure. Speculation as to what he might have been adds interest to what he was.

Lord Justice Thesiger's untimely death on the 20th of October, 1880, put an end to the anticipations of his career to which his sudden elevation to the Court of Appeal, three years before, had given rise. A man of active disposition, but not of strong constitution, he had been in the habit of bathing in the sea when unfit for it. An affection of the ear developed itself and led to blood poisoning, which carried him off. Fortunately he lived just long enough to see his brother, Lord Chelmsford, retrieve at Ulundi the honours which have fallen on his family, but which, in the field of battle,

were imperilled at Isandula. In the interval, he had, by letters to the newspapers and otherwise, done his best to sustain his brother's credit, with a warmth and devotion illustrative of one of the best sides of English private life.

There were persons who saw more in Thesiger's appointment as Lord Justice than an example of the predilection of Lord Beaconsfield —with whom, as Prime Minister, the nomination of a Lord Justice rested, rather than with the Chancellor—for young men in the service of the State, and a graceful reparation for Mr. Disraeli's supersession of Lord Chelmsford on the woolsack in 1868. A parallel was drawn between the progress of Lord Cairns and that of Mr. Alfred Thesiger, and, in spite of the fact that the shortlived Lord Justice had never been in the House of Commons, and had never attempted to enter it, he was pointed at as the future Conservative Chancellor.

Whether there was any ground for a kind of prophecy not uncommon among ingenious persons, has not been divulged ; but there was much in Thesiger's powers and position to support the theory that Lord Beaconsfield

wished to hold him in reserve for the woolsack. As a sound lawyer, an industrious worker, with a good presence and ample powers of expressing himself, and as inheriting and carrying on a reputation for the integrity and honour of the *preux chevalier*, Thesiger would not have brought discredit on the woolsack. What he wanted was brilliance, and there are occasions when other qualities make up for the lack of it.

Thesiger was a man who worked up to the highest pressure of his powers, both physical and intellectual. He was not one of those of whom there have been many examples in English legal history—men who made their way, in spite of adverse circumstances, by force of genius and perseverance alone. Being placed in the best situation for success, he was equal to the situation, and succeeded. He would not have succeeded had he not possessed great industry and conscientiousness, and he would not have had that conspicuous popularity with his fellows which followed him, but for the want of assumption seldom belonging to those with similar opportunities.

This modesty showed itself from the time when, leaving Eton, he went to Oxford, and entered for a "pass" degree, although afterwards advised by the examiners to change his mind and enter for "honours." The state of his health prevented this advice being taken.

He was called to the Bar in 1862, with all the prestige of a son of Lord Chelmsford, who had twice filled the office of Chancellor with approbation, if not distinction. As one of the first steps upwards which may assist the rise of exceptionally favoured barristers, he was made Postman of the Exchequer, the official who in ancient days sat by the Post, the measure of length, which at one side of the Court kept in countenance the Tub, or measure of capacity, on the other, with its corresponding Tubman, both always places of mere honour, and now things of the past, together with the Exchequer itself. He received, further, a golden shower of Parliamentary and compensation briefs, was made a Queen's Counsel at an early age, immediately he desired it, without waiting for the next batch of creations, and was appointed Attorney-General to the

Prince of Wales. No one was more the counsel "in fashion" of his day.

Help like this was useful, but it would have been thrown away on persons not possessing his native gifts and moral qualities. He was credited with a conscience in regard to the acceptance of briefs much more tender than that of most of his contemporaries. On one occasion, shortly after he was made Queen's Counsel, he was obliged on Circuit to return a brief to keep a pressing engagement in town. The brief went to a Queen's Counsel, who a few months after was a judge; and to Thesiger's astonishment, when he entered the railway carriage, he found it occupied by this very Queen's Counsel, who gleefully informed him that he had "settled" that case, and was going to town to oppose him in the other.

Those who sent their briefs to Thesiger knew that the law and facts would be mastered by him. He was not a man of great quickness of parts; but he knew his defects. He acquired by labour what others had by intuition, and was able to equal and sometimes beat them in the race. He had not the faculty of picking

up facts as from hand to mouth, and perceiving the law as if by instinct; but, by hard work, he made himself practically almost as effective a forensic ally as if he had been gifted by nature with these qualities.

The process he pursued was in the highest degree creditable to his powers of application and self-constraint; but it demanded great bodily and mental exertion. Without any wild theorizing, it may well be supposed that under this strain the machine broke down.

The rest which the Bench supplied—coming, although it did, much earlier than any one born under inferior auspices could have expected — was not sufficient to restore the balance. His tall figure, grave face, clear-cut features, and manners of serious suavity realized the idea that had long been formed of him, that he was in person born for the Bench. The few criminal trials in which he took part justified the high estimate which had been made of his moral qualifications for a judge's work. He was not long enough a judge to make an estimate of his powers as a lawyer possible. He was patient, cour-

teous, and painstaking. It fell to his lot to prepare several of the judgments of the Court of Appeal in the cases in which he took part, and they are examples of close reasoning, clear expression, and a careful examination of the authorities. He had time to exhibit independence of judgment. As recently as the February before he died, he differed from Sir George Jessel, the then Master of the Rolls, and Lord Justice Baggallay in the case of *In re Hallet's Estate,* being of opinion that the Court of Appeal ought not to overrule a previous case decided in the same Court—a view in which it is not presumptuous to say that he was supported by professional opinion.

The judgment on the career of Lord Justice Thesiger will be that he deserved success; that he was in a position to attain it; and that, in availing himself to the full of his opportunities, he displayed qualities of a high order; but the glamour cast by an early death disturbs the judgment, and the fancy that whom the gods love die young extends even to judges.

HOLKER.

1882.

HOLKER was one of the first political lawyers who fell a sacrifice to the exigency of modern politics. It was not until four days before his death that he resigned the office of Lord Justice, as it was clear that he would not be fit for work again; but it was thought not improbable that his life might be prolonged for some considerable time. His death, in the fulness of his career, may well be considered happier than if it had come after a lingering struggle with the wasting disease to which so many lawyers have succumbed.

Another victim emphasized to lawyers the warning that they cannot burn the candle of vitality at both ends. The office of Attorney-General provides exceptional tempta-

tion for that disregard of health which is not unknown in any branch of the profession of the law. It is probably the most laborious post in the three kingdoms. The Attorney-General has to give his days to law and his nights to politics, which left, in days of late Parliamentary sittings, but little out of the twenty-four hours for the man himself. Holker, at the end of his career as Attorney-General, gave up his private practice. The effect of this wise step was not to prevent his obtaining as much work as he wished when his party went out of power; but in Holker's case the relief came too late. When he returned from abroad his appearance was a shock to his friends, and he had scarcely been appointed to the Bench, when it was evident that he was a dying man. His death deprived the profession of one of its most popular members, and cut short a promising judicial career.

No judgment can be passed on Holker's career on the Bench. He took his seat on January 18, 1882, in the Court of Appeal at the invitation of Mr. Gladstone, the leader of his political opponents; and, although in the four

months during which he was a judge he took part in several decisions, yet none of them were of a kind to bring out the highest judicial qualities. The most important point which came before him arose in *Gibbs* v. *Guild*, in which the question was whether, in an action for fraud, the Statutes of Limitation begin to run from the commission of the fraud, or from its discovery. The mind of Holker, trained in the stricter lines of the common law, rebelled against the patronizing manner with which equity lawyers have treated the Statutes of Limitation and other statutes. The Lord Justice was of opinion that, as the statute said that the time was to run from the commission of the fraud, the judges ought not to decide that it ran from some other date. Almost immediately before Holker left England, the year before his death, he delivered at the Bar, in a different case, an argument on the same question, which is reproduced almost in the same language in his judgment in *Gibbs* v. *Guild*. He, as counsel, had persuaded himself, as judge, that his argument as counsel was well founded.

Holker will be remembered rather as a barrister than as a judge. Few Attorney-Generals were so popular with the Bar as he. His popularity was due not to manner, but to solid acts of kindness and a complete absence of affectation.

A story is told on the Northern Circuit of a young man who found himself without funds at a remote town on his first Circuit. He asked Holker to lend him ten pounds, and was surprised, at the mess-table, to have a fifty-pound note put into his hand, which he was to repay when he chose.

He was equally popular with solicitors, who knew that their cases could safely be placed in his hands, and who in the last two years of his practice employed him to the extent of £20,000 a year. It may be said of him, as can be said of few leading counsel, that he never snubbed a junior. He would pay attention to the suggestion of the solicitor's clerk who brought the papers to consultation. As Attorney-General, he never spoke in Court without an ear wide open to the voice of his "devil," Mr. (afterwards Lord Justice)

Bowen; and on the rare occasions when they were opposed, it was amusing to see how he would turn in a difficulty to his familiar prompter, expecting grapes from thorns.

As a forensic advocate, Holker had very few equals in his own line. The impression of him presented to the ordinary spectator was that of a dull, heavy man, apparently half asleep. But no one could follow an important commercial cause in which he was engaged without feeling that his conduct of it was masterly. His complete knowledge of the details of business, and of the habits of thought of business men, enabled him to cross-examine witnesses so as to show them in their true light to the jury. In addressing jurymen, he was careful to suppress all appearance of oratory, and to profess that he knew no law. He appeared a plain man like themselves, and he put before them a common-place view of the case.

A manner of this kind, although fruitful of successful verdicts, was not likely to take the world by storm. Holker did not possess what is known as culture; and he was too

honest to affect to possess it when he did not. After some years he established a reputation for solid qualities; but his want of enthusiasm prevented his being either a warm partisan or a great speaker.

As a prosecutor in criminal cases his manner was perfect, as particularly appeared in the prosecution of Wainwright for the murder of Harriet Lane. His manner well represented the gravity of the occasion. He was conspicuously fair to the prisoner, but at the same time his conduct of the case was deadly.

In Parliament his ponderous style made at first very little impression, and the literary sharpshooters were in the habit of calling him Sir John Hulker. It was found, however, that he did not speak unless he was obliged, or unless he had something to say on a subject which he understood. After this discovery was made, he was always listened to when he spoke. Attorneys-General have, however, often to speak on topics which they do not understand, and on these occasions Holker floundered wofully. It was very creditable to his intellectual honesty that he treated the

Bradlaugh case as a pure question of law, and he formed and expressed an opinion upon it which was not palatable to the rest of his party. In the Brighton Aquarium case he developed a fund of humour little suspected of him.

His treatment of the Tichborne claimant's appeal on a writ of error was not equally wise. It became Holker's duty to grant or refuse a fiat for the argument of certain so-called points of law arising on the conviction and sentence. There was at that time a great deal of clamour in the Claimant's favour, especially in the taverns and music halls, a quarter from which the Conservatives derived support. The logicians of these resorts argued that a working man ought not to be deprived of his rights, forgetting that the Claimant's rights were inconsistent with his being a working man. Possibly Holker, who had not a keen instinct for law, really thought there was something in the points raised, in spite of Bowen being always at hand to consult, but it is more likely that political expediency overpowered his judgment. The points when they came

before the Court were found baseless, in spite of a strenuous argument by Benjamin, and Lord Justice James, an equity lawyer, characterized the allowance of the fiat on such groundless allegations of criminal law as improvident.

A good story illustrates his simplicity of nature. Holker one day was leaving the House of Commons when he was addressed by two strange ladies, who asked him to show them the House. He politely led the way, duly pointing out the objects of interest. At the end one of the ladies handed to their conductor a sixpence, which the Queen's Attorney-General took with a low bow and afterwards hung upon his watch-chain, declaring that it was the only sixpence which he could safely say he had honestly earned.

Holker, like his predecessor Lush, made his way upwards from the lower rungs of the professional ladder. He was first a solicitor, then a local barrister, afterwards Queen's Counsel, Attorney-General, and Lord Justice. Since the death of Thesiger no such painful event had occurred; and it was seldom

that there took place within so short a space three deaths like that of Thesiger, after three years' service on the Bench; Sir Henry Jackson, before he could take his seat; and Holker, four months a Lord Justice.

AMPHLETT AND HALL.

1873–1882.

THE two ex-judges (Sir Richard Amphlett and Sir Charles Hall) who died within the short space of a week from one another, take their places in legal history, not from any enduring mark which they left on the law of the country, but from the part which they took in the great legal reform of the century, the fusion of law and equity. The last appearance of Amphlett in public was at the opening of the Royal Courts in December, 1882, when he was carried in upon a chair, and his coming at all was an evidence of the courage and strength of will which distinguished his character.

It required no small effort for a man at the age of sixty-three, used only to the quiet practice of Lincoln's Inn, to undertake as

judge the conduct of the rather turbulent elements of Nisi Prius and Criminal Courts. A man of greater self-confidence would have felt the effort less. Lord Brougham, when he threw off the "trappings" of Chancellor, after his first experience of equity, declared that "there was not so much in it after all." But Amphlett was weighed down with a great sense of responsibility, and there is no wonder that he hesitated.

It has been said that his doubts arose from a fear of his reception by the common law judges; but so groundless were these fears that they can hardly have existed. The real doubt, honestly entertained, was his own competence to perform the task imposed upon him. It is true that he had, some forty years before, attended sessions, and gone Circuit, and was at the moment Chairman of Quarter Sessions for Worcestershire; but these facts were rather useful to allay any public feeling there might be that a wholly untried man should not be suddenly set with the lives and liberties of prisoners in his hand than effective to alter the true nature of the step which he

was asked to take. Amphlett had the courage to accept the post of difficulty offered to him, and he discharged its duties with complete satisfaction. Probably the burden largely contributed to the attack which, after less than four years' service, disabled, and eventually killed him.

It is necessary to recall the state of legal affairs at the end of 1873 and the beginning of 1874 in order thoroughly to appreciate the nature of the services which Amphlett and, in a lesser degree, Hall rendered to legal reform.

Lord Selborne had made up his mind to break down the barriers between law and equity, and in drafting the Bill which became the Judicature Act, 1873, had availed himself of the skill as a draftsman of Mr. Hall. But there was much more to be done. The attempt had been made before on paper, and had failed through the reluctance of the common law judges to accept the doctrines of equity. They had an intellectual antipathy to them, and did not scruple to characterize some of the equitable rules as iniquitous. How completely the English law educated its

professors so that the right hand knew not what the left hand did was illustrated shortly before Amphlett's death by the oldest of the common law judges, who avowed his total ignorance of the existence of such things as equitable assignments. In the days of Baron Parke, great lawyer as he was, the common law judges would have expressed not merely ignorance but contempt.

All that was changed by the simple expedient of putting equity judges on the Common Law Bench. At the death of Amphlett there was no equity lawyer in the Queen's Bench Division. Baron Amphlett had long since left it, Lord Justice Lindley had gone to the Court of Appeal, and Mr. Justice North had been transferred to the Chancery Division. Shortly after his death Chancery judges ceased to go Circuit. The plan, however, had done its work. Equity had obtained a firm footing on the Bench beside the common law, and it was then time to attend to the wise maxims plentifully showered at an earlier stage to the effect that law and equity judges were operators with a

different class of skill, and that it was absurd to put the one to do the work of the other.

Honour is due to the judges who fought the battle of equity on the Common Law Bench, of which battle Amphlett bore the brunt. It was easy to understand that his appointment was an opportunity not to be missed. The Judicature Act, 1873, had passed, but at that time it was not to come into operation until November, 1874. There was a vacancy in the Court of Exchequer, which was one of the Courts to be turned into a division of the High Court, and which, as then intended, was to exercise the jurisdiction in bankruptcy—a jurisdiction which from the beginning had consisted of mixed law and equity. Amphlett was an equity lawyer of ability and firmness, of whom it could not be said that he had not seen the inside of a criminal Court. To put an equity lawyer on the Common Law Bench while the Judicature Act was in suspense was to show that fusion was to be carried out in earnest.

Amphlett accepted the situation, and duly went through the formalities accompanying

the creation of a common law judge from which equity judges were free. He was admitted a serjeant, of which body he was one of the last, before Lord Coleridge, who had then been Chief Justice of the Common Pleas some two months; and the solemnity of ejecting him from Lincoln's Inn Hall was duly performed under the presidency of Lord Justice James, who made an appropriate speech. Shortly afterwards he found himself plunged in the vortex of the Northern Circuit.

Baron Amphlett found himself the sole equity lawyer at Westminster without the benefit of the charter which the Judicature Acts were to confer in those quarters on the science in which he had been educated. For nearly two years he had to decide and reason as if there was no such thing as equity, except when a stray equitable plea came before him, of which there does not appear to be any reported instance. It so happened that the most important of the cases in which he had to take part side by side with Chief Baron Kelly, Barons Bramwell, Pigott, Cleasby, and Pollock, were railway cases, of which an early example,

Vaughton v. *The London and North-Western Railway Company*, decided that in a civil action against a railway company responsible for nothing but the felony of its servants, it is not necessary to prove the felony with the same particularity as upon an indictment. In *The Attorney-General* v. *The North London Railway Company*, he was one of the judges who laid down that the Cheap Trains Act, relieving from passenger duty, applied to trains running in the manner in use on the defendants' line. In *Cohen* v. *The Great Eastern Railway Company*, he had to consider the question of the reasonableness of a contract by a railway company, and joined in holding that passengers' luggage comes under the protection of the Act requiring the contract of carriage to be reasonable. *Saint* v. *Pilley*, in which the rights of a purchaser of fixtures sold before the trustee in bankruptcy surrendered the lease were vindicated, belonged to a class of cases in which law and equity were at one. The same may be said of *Bobbett* v. *Pinkett*, in which the Exchequer Division held that the drawer of a specially

crossed cheque paid through an unauthorized bank was entitled to recover its value not only from his own bank, but from the holder who had received the proceeds without title. He besides took part in *Treloar* v. *Bigge*, which throws great light on the question of licences to assign leases which are not to be arbitrarily withheld by the landlord, and *Copin* v. *Adamson*, which is a leading case on foreign judgments; and in *Wood* v. *Woad*, which vindicated the right of a member of an insurance society not to be expelled without an opportunity of being heard. In *Thorn* v. *The Mayor of London*, a case arising out of the building of Blackfriars Bridge, and laying down that the employer does not guarantee the feasibility of the specifications for the benefit of the contractor, Amphlett prepared the judgment of the Court, which was afterwards upheld in the House of Lords.

Amphlett had only one year's experience of the Judicature Acts in the Exchequer Division, and one year in the Court of Appeal, where he found himself no longer alone as an equity lawyer.

A parallel has been drawn between his elevation to the Bench and that of Baron Rolfe, afterwards Lord Cranworth; but the resemblance is only on the surface. Rolfe, it is true, was an equity lawyer; but the Exchequer jurisdiction in equity was exercised as separately from its common law jurisdiction as if the Courts were separate, and a year after Rolfe's appointment the Exchequer jurisdiction in equity was, in fact, abolished, and left to be exercised in Chancery by a new Vice-Chancellor appointed for the purpose. Rolfe was an equity lawyer, with some experience of criminal law, who was appointed a common law judge, and so was Amphlett, but the two appointments had not the same significance nor the same result.

The success achieved by the Judicature Acts in their main object was largely due to the change made in the *personnel* of the Bench at the time of their coming into operation. Amphlett's public career has for its basis the foremost share taken by him in bringing about this result. In private life he was universally beloved and respected, and on or off the Bench

was always courteous, kindly, and without affectation or undue self-assertion—qualities often contributing more largely to success in a judge than more brilliant gifts. In his retirement he was a genuine country squire, not of the spurious form affected by ex-lawyers.

The same high praise in point of personal qualities must be given to Hall, the circumstances of whose latter days were not unlike those of Amphlett. Hall owed his elevation to the Bench to the share which he took in the preparation of the Judicature Act of 1873, which passed into law a few months before he was made Vice-Chancellor. The sections transferring the jurisdictions of the existing Courts to the High Court of Justice are obviously drawn in the style of a highly skilled conveyancer, although the symmetry of the performance was terribly marred by the Judicature Act, 1875, which made the Supreme Court of Judicature a misnomer and a shadow. Hall was the greatest conveyancer of his day, and he had a most minute acquaintance with equity case-law. He began law in a solicitor's office, and learned real property law in the

chambers of the celebrated conveyancer, Duval, whose niece he afterwards married. Among his fellow pupils were Davidson and Waley. His knowledge of real property law stood him in good stead on the Bench, but this and his other qualifications were not of a kind to make him a great judge. The law has not been elucidated by any luminous judgments of his. A detailed acquaintance with case-law is apt to injure the grasp of principle, and the Vice-Chancellor's training was not such as to make him great in dealing with the complicated questions of fact which fall to the lot of a Chancery judge.

There is much similarity in the careers of these two men who contemporaneously took part in the administration and reform of the law at the Bar and on the Bench, and were hardly divided in their deaths. Both did the work which came to their hands conscientiously and well, and added credit if not lustre to the profession which they adorned.

HATHERLEY.

1853–1872.

HATHERLEY was altogether an exemplary man. He had most of the cardinal virtues. He was up every morning early, and went to church before breakfast. His punctuality was a proverb all the way from Great George Street to Lincoln's Inn, and the tradesmen in Parliament Street set their watches as the Vice-Chancellor passed. His industry and conscientiousness were such that he not only mastered every detail and argument in the cases which came before him, but dealt in his judgment with every fluctuation in his own mind in the progress of the case. On Sundays he taught in a school, and every anniversary of his wedding-day he wrote a sonnet to his wife.

With all this he would not have been Lord Chancellor but for an accident. When Westbury left the woolsack and Cranworth reigned in his stead, Palmerston said to Cranworth, "You see, Cranny, how much better it is to be good than to be clever." No such epigram could have been made when Wood was appointed Lord Chancellor instead of Palmer, because both were equally good; but in Wood's case cleverness counted less than convenience of opinion. For some years Wood, although a staunch Churchman, had been in favour of the disestablishment of the Church of Ireland. Palmer was against it. Gladstone wanted his measure to be supported by men of known religious convictions, and in default of Palmer, Wood was the very man for him. In the debate on the Irish Church Bill the House of Lords sat late; Wood, elevated to the woolsack as Baron Hatherley, made a long speech, and next morning, for the first time in his life, missed the early service at the Abbey.

Like many men of his type, Hatherley had to perfection the *mens conscia recti*. He was always so sure of the purity of his own motives

that they did not admit of question in his own mind, and the contrary opinion in other men was mere perverseness. From the time when he took part in the "barring-out" of the schoolboys at Winchester to the Collier case and the Beales case this was his frame of mind. His vindication of the appointment of Collier to a judgeship after his sitting for one day in the robes of Sir Montague Smith in the Court of Common Pleas, to give him the qualification under the Act, and of his appointment of Beales to a County Court judgeship after Cockburn had declined to re-appoint him a revising barrister because he had been a contributing cause of the pulling down of Hyde Park railings, was not so much an argument as an exposition of his own consciousness. He did not even take care that his statements were accurate. From £700 to £800 a year was stated by him to be the salary of which Beales was deprived, when it was in fact £210. Beales was said to have given up his practice in Chancery to earn it, when in fact the work only occupied him for three weeks in the Long Vacation. For one

high judicial officer to recompense a sufferer from the act of another high judicial officer, far from appearing to him of evil example, was the avowed motive of which he was proud. Again, he stated that Collier on being appointed a judge of the Court of Common Pleas became *ipso facto* a member of the Judicial Committee, which was not accurate; and finally, he argued as if, as Lord Chancellor of England, he had as little to do with the spirit of an Act of Parliament just passed as if he were a prisoner's counsel quibbling for a client's life.

If Hatherley could have better judged himself, he would probably have discovered that after all, concealed by a conscious honesty of purpose, there was some of the leaven of party and some jealousy of Cockburn at the bottom of his motives.

As a judge, Hatherley was efficient, but did not leave his mark on the legal literature of the day. He was much better as a Vice-Chancellor, to whom care, patience, and acuteness are invaluable, than as Lord Justice or Chancellor, in whom higher qualities are ex-

pected. He was the delight of the circle of painstaking, plodding persons forming the bulk of the equity bar, who liked a judge to listen and take notes of all they said, and to notice all their arguments in deciding; but his judgments were diffuse, discursive, and obscurely expressed, as witness the four volumes of "Kay and Johnson." When Lord Chancellor, he succeeded even in satisfying Miss Shedden, a persistent appellant in the House of Lords, whom he heard patiently day after day, and in whose favour he once broke his rule of rising as the clock struck four, acceding to her prayer for "five minutes more." He was generally sound and just in his decisions, but without any originality of thought or expression. He was popular with his brother judges, and when Lord Campbell, in the House of Lords, in affirming Hatherley, ventured to suggest that he would have arrived at his conclusion more comfortably if the Vice-Chancellor had compressed his observations on the case, Romilly, the Master of the Rolls, Kindersley, and Stuart, his brother Vice-Chancellors, came to his assistance, and remonstrated with the

Chancellor, only, however, to receive a sneer from Campbell. Some great men elected to practice in his Court: Cairns, Rolt, Giffard, James, and Amphlett, all afterwards judges. Once only did he offend his bar, and that was when he ventured upon the opinion that the common lawyers examined witnesses better than they; and this was made the occasion of a humorous "chapter from Froissart," in which "William de Bosco" (otherwise le bien Aïmé) was made to do penance for having rashly aspersed the skill of his henchmen with the long-bow. Hatherley never delivered a written judgment but once, and his rambling decisions were a sore trial to reporters.

In appearance, Hatherley was a stern-looking man, with a long, narrow face, deep-set eyes, overwhelming brows, and a shock of hair on a large head. His eyes were the weak point in his physical powers. Only one eye was ever serviceable; the other was so short-sighted as to be useless. He was obliged to resign the Lord Chancellorship through failure of his sight, which eventually turned to total blindness, an affliction borne with the utmost

patience. Bowman operated upon him for cataract, and extracted the lenses of the eyes so that with the aid of powerful glasses he could partly see again.

Hatherley owed his success in some measure to his connection with the City. His father, as Sheriff of London, had been called upon, much against his will, to arrest Sir Francis Burdett, and he was afterwards Lord Mayor. He was the Sir Matthew Wood who was one of the firmest supporters of Queen Caroline. The earliest legal work of William Page Wood, the son, before going to Cambridge, was to collect evidence on behalf of the Queen, and he spent some days with Bergami, the courier, in his villa at Pesaro. It is unnecessary to say that his faith in her innocence was perfect.

Wood read law with some eminent conveyancers. After his call to the Bar he was in his turn snubbed by Vice-Chancellor Leach, and had some Parliamentary briefs. After becoming a Queen's Counsel, he practised before Wigram, and became member for Oxford. In Parliament he was an orthodox

Radical, though High Churchman, was for the ballot, and sincerely believed that Baron Rothschild could take the oath, omitting the "true faith of a Christian." Lord John Russell made him Solicitor-General, and he proceeded in due course to be Vice-Chancellor and Lord Justice, and with a leap, Lord Chancellor.

His nephew, Sir Evelyn Wood, in Africa and Egypt opened a less prosaic page in the history of the family; but the career of Lord Hatherley, though not brilliant, was honourable and useful on the judgment seat. The worst that can be said of him is that he was an egotist, and burdened the books with many long and obscure judgments; but he was always credited with purity of motive and conscientious industry, and his memory is cherished with affection and respect.

MALINS.

1865–1881.

Among his contemporary judges Malins had a very distinct individuality. Weakness in law is not unknown among the judges of the land, but it is almost invariably accompanied by an attempt, very often successful, to conceal it. Malins was unconscious of any weakness, and gloried in his bad law. His characteristic was not so much ignorance of law as want of sympathy with law as a system. The amiability of his appearance—that of a broad-faced, good-natured Englishman—extended to his character. If his jurisdiction had been confined to looking after the wards of the Court of Chancery, his reign on the Bench might have been an unmixed blessing. His paternal aspect, kindly manner, and ready

sympathy marked him out as an ideal, if indulgent, representative of the Crown as *pater patriæ*. If, instead of the wards of Court being distributed among the Chancery judges, the fittest among them were chosen to play for all the part of judicial father, the choice would deservedly have fallen on Malins.

Malins not only managed his wards well, but in the conduct of business in Chambers generally he was thoroughly at his ease. He was accessible to every one, would joke with the humblest solicitor's clerk, and hardly ever sent any one away displeased. "Turkish bonds," said Malins one day to an applicant who wanted trustees to be allowed to continue their testator's reliance on the faith and ability of the Sultan, "are rather risky as a security, are they not? But you say the widow's income will be reduced? Well, I have some Turkish bonds of my own; I think they will go up, and I suppose I cannot forbid trustees doing as I do myself."

Malins, in fact, was a judge whose personal virtues were judicial vices. So strong was his love of fair dealing and hatred of oppres-

sion, that he did not look very closely to the means by which he came to decide in favour of those who had aroused his sympathies. The legal knowledge, in which he was by no means deficient, was sternly repressed. He considered it his duty to give effect to what he believed to be the natural justice of the case; and, in justifying this course by reference to the law, would use arguments the fallacy of which on general principles was apparent.

Malins's memory will last from the boldness with which, at a late date in the history of law, he attempted to give effect to something higher than law. Enthusiastic admirers claimed for him that he would have made a great judge in equity in the days of Lord Hardwicke. But his decisions were not formed with a view to their general application. His views with regard to the promoters of joint-stock companies, money lenders, and holders of bills of sale, may be briefly summarized by saying that he would decide against them all if he possibly could; and those who resorted to his Court relied generally on the fact that they

were the weak against the strong, or the innocent against the acute, or on other matter of general prejudice.

When all other means failed of bringing about the result which Malins thought justice required, and he was pressed to decide according to law, he was fertile in expedients for bringing about a compromise, or if that failed, for attempting to make the party legally in the right forego his costs. "Is the solicitor here?" he would ask, and when the solicitor stood up in the "well," he would appeal to his conscience. "Your clients are very rich people; they do not want costs. I know who they are very well. Why, Lady Malins always buys their tea. Come, you can consent for them?" If no consent were forthcoming, Malins would deprive the successful party of costs, or would give costs to the unsuccessful party. He knew that there was in general no appeal as to costs, but he relied on this once too often. A story of Miss Braddon's was published with a name which had been used before for another story. The proprietor of this story brought an action to restrain Miss Braddon's publisher. Malins

did not go so far as to restrain him, but made him pay the costs, a decision which the Court of Appeal promptly overruled, as there is no copyright in a name. It was Malins, too, who restrained a man from calling his house "Ashford Lodge," at the instance of a neighbour whose house already bore the name. He sympathized with the woes of the postman and of the lady of the house, whose letters miscarried; but the Court of Appeal was obdurate.

There was no patent want of acuteness or appreciation in Malins; but he was not forensic. He did not draw from the vast river of justice, but preferred a little rill of his own. His position, sitting alone in his own Court, made these defects more pronounced. If he had sat occasionally with other judges, or had been frequently brought in association with them, his failings would have disappeared or lessened.

But his only point of contact with other judges was when he was overruled; and those occasions produced in him an intellectual obstinacy which did more harm than good.

Perhaps he was sometimes unjustly overruled, as the decisions of a judge who is often reversed are apt to be treated with scant respect in a Court of Appeal. He never missed an opportunity of justifying to his own Bar his overruled decisions, and his delight was great when once or twice a decision of his, reversed by the Court of Appeal, was restored in the House of Lords.

His peculiarities led to two evils in the Court over which he presided. The lesser one was that appeals were frequent; but, in the large class of non-contentious cases which come before a Chancery judge, and in which there is practically no appeal, the evil was even greater.

A perfect judge must, in fact, be either a stoic or a cynic. Malins was very far from being either. His tenderness of heart prevented his being the one; and his worst enemy, if he had enemies, would not accuse him of being the other. His personal character was beyond reproach, and his judicial aberrations were always in the most perfect good faith. He deservedly earned the goodwill

and affection of all with whom he came in contact.

The conduct of business in his Court illustrated in an extreme form the dangers of the system by which in Chancery the judge sits day after day with the same counsel in the front row before him. The inevitable result of this practice is that one of these counsel obtains "the ear of the Court," to his own great profit and to the frequent success of his clients. It was characteristic of Malins that he did not surrender to the usual arts of the courtier-advocate. Mr. Glasse, who, during most of the time he was on the Bench, had the Vice-Chancellor's ear in his keeping, was no flatterer, but rather owed his supremacy to the boldness with which he opposed the Vice-Chancellor, to a masterful manner and to a will which was stronger than the judge's. Not that Malins gave way always, or quietly. There were sometimes long and angry wrangles between Vice-Chancellor and Counsel leading occasionally to what are called scenes in Court.

In general, however, matters went on smoothly and pleasantly, if diffusively. The

leaders of his Bar knew his blind side, and aimed at it. His mind was of a discursive turn, and a very small connection between two subjects would start him off on topics far away from the case in hand. The 20th of August in a certain year was mentioned as the date on which something happened, such as the execution of a will. "I do not know where you were on that day, Mr. Glasse," said the Vice-Chancellor, "but I know where I was. I was at that delightful little place Odde, on the Hardanger Fjord." "No doubt," replied Mr. Glasse, "your honour's feats on the fjord were very enjoyable." Thus diverted, the conversation was some time in coming back to the question what the testator meant by his will. His love of travelling gave opportunity for these diversions, and his start for the ascent of Monte Generoso on a donkey made a great impression on those who happened to see it.

At the Bar he had made his way by upright conduct and honest work. As a conveyancer, he had a high reputation for learning and ability, as was evidenced by his full pupil-

room, many of the occupants of which, like Lord Cairns, became eminent.

It was always a sore point with Malins that Cairns, when Chancellor, did not make his former master a Lord Justice of Appeal. Both had served the Conservative party, Malins, as member for Wallingford, in the House of Commons. Cairns, however, probably knew Malins's capacity better than any one else, and did not see the humour of translating a judge from the task of being overruled to that of overruling others. It so happened that the pupil became a judge before the master, and Malins argued a case before Cairns as Lord Justice of Appeal.

When in Parliament, Malins, who spoke often and at length, was instrumental in passing two Acts which go by his name, one in regard to infants' marriage settlements, and the other to married women's reversionary interests. The second of these has been overshadowed by the Married Women's Property Act, 1882, but by the first his name will probably be preserved longer than by his fame as a judge.

The extent of his influence as a judge was

increased by the now abolished system prevailing in his time in Chancery, which allowed plaintiffs to choose their own judge. Hard cases, without law on their side, found their way into Malins's Court, so that his peculiar failings were exaggerated. This system was tempered only by the liability of transfer to other judges, when suitors often discovered that if they could not have the judge of their choice, they would have no law at all, and withdrew their cases. The history of his Court produced a change in the system, so that Chancery cases are now assigned to judges by rotation.

His death was accelerated by that failing of most lawyers, bad riding. He had a fall shortly before he retired from the Bench, which brought on an attack of paralysis, and he died a few days after his wife. Lawyers are said to ride like sacks, more especially equity lawyers. Probably Malins and Glasse between them would have made out of an experience of this kind the sorry jest that equity and equitation are incompatible.

Malins, with all his faults, was an upright judge and a kindly gentleman.

CAIRNS.

1866–1880.

THE place which history will assign to Cairns will be that of the greatest lawyer on the English Bench of his generation. The late Mr. Benjamin, whose capacity for passing a judgment and impartiality in the matter will not be questioned, pronounced Cairns the greatest lawyer before whom he had ever argued a case, and Lord Bramwell is known to have had the very highest estimate of his powers.

His death, at an early age compared with the average years of successful public men, was the last evidence of the physical weakness with which his career was weighted throughout. If he had lived, he would probably never again have taken his seat on the woolsack. Deafness, arising from "ivory in the ear," had of late years been added to the infirmity of

the chest from which he suffered all his life. Upon the last occasion on which he sat in the House of Lords for the purpose of taking part in the rehearing of an appeal which, on the original hearing, had equally divided the law lords, he found it necessary to sit close to the bar of the House, and even in that position was obliged to ask the counsel being heard to raise his voice. At one period of his life Cairns was practically kept alive by breathing inhalations prescribed for him by a well-known specialist in asthmatic disorders.

His health, therefore, was a sufficient explanation of the intervals between his public appearances and of the comparative rarity with which his name appears in the "Reports" for the nineteen years during which he was in a judicial capacity. It was only with great care that he was fit for his duties at all, although he was at no time at all like an invalid either in appearance or in habits.

During a large part of his practice at the Bar he invariably refused briefs for Saturday, and on that day gave himself a holiday, which he usually spent in the hunting-field. The Long

Vacation generally found him on the moors of Scotland. After his elevation to the Bench, it was again in the interest of his health that he took up his residence at Bournemouth, and it is well known that the same consideration made it necessary for him to resign the Conservative leadership in the House of Lords. As a compensation for this life-long drawback his powers matured quickly and his opportunities came early. He was a Queen's Counsel at the age of thirty-seven, and Her Majesty's Solicitor-General before he was forty.

The attribute in which Cairns excelled was lucidity. The most complex legal problem presented no difficulty to him, and it passed out of his hands placed by his mere statement in so simple and clear a light that the wonder was why there could ever have been any difficulty about it. Readers of his judgments are like those who look for the first time on a simple mechanical contrivance producing great results.

"The invention all admired, and each, how he
To be the inventor missed; so easy it seemed
Once found, which yet unfound most would have thought
Impossible."

Cairns made no display of a depth of reading like that of a Willes or a Blackburn, although he was far from deficient in learning. Case-law a man of his powers could afford to despise, and even when at the Bar he was in the habit of citing no cases until he had exhausted the principles of the argument, when he would mention the names of the authorities illustrating his propositions.

Much of the logical precision which distinguished him in the statement of legal propositions was due to the fact that, in the chambers of the late Mr. Thomas Chitty, at King's Bench Walk, he was well grounded in the practice of common law pleading, a kind of training of which students at the present day are unfortunately deprived.

Cairns on the Bench was not like Jessel, fond of bringing his own individuality to the front, or of exposing in his judgments the processes by which he arrived at them. In delivering judgment, he was like an embodiment of the voice of the law, cold and impersonal, and suggested an intellectual machine upon which no sophism could make any impression, and

which stamped the seal of the law upon what was obviously reasonable and just.

Perhaps Westbury was his equal in penetration and in clearness of expression ; but either from his matter or his manner he did not carry the same inexorable conviction. In Cairns's judgments there was no indication of the intellectual waste which gives a human interest to the productions of some thinkers; the workings of his mind made no pause or hesitation. It was as if the metal were placed under the die, and with a few turns of the wheel the perfect coin was minted.

Examples of these judgments are to be found throughout the Reports from 1874 to 1880, when he was on the woolsack. In *Riche* v. *Ashbury* he decided that it was beyond the powers of a railway carriage company to finance a railway company, although it had by its memorandum of association, after enumerating specific branches of business, reserved to itself the vague powers of general contractor. In *Thorn* v. *The Mayor of London*, he held that the City did not guarantee for the benefit of the contractor

their engineer's plans for making Blackfriars Bridge. In another case, he laid down that an owner of coal mines, employing an agent, was not bound to go on working his coal for the good of the agent. Again, Mr. Jackson, an unlucky traveller on the underground railway who had his thumb crushed in the doorway of an overcrowded carriage, was pronounced not to have made out a case of negligence against the company. Two leading cases of contracts for the sale of land to be collected from letters came before him. In one, although there was a point of time at which the parties were at one, the claim was not allowed because the matter had afterwards been reopened. In the other, the contract in the letters was held good, although a formal agreement was contemplated and not entered into. In a Stock Exchange case, he decided that a jobber who passed the name of an infant incapable of contracting as buyer of shares was liable to make good calls on them paid by the customer of the broker who had sold to him. In an agricultural case, he held that a man who sends pigs to market for sale does not warrant them free from fever,

although his sending fever-stricken pigs to market is a penal offence.

An example of the high estimate he had of the dignity of judicial proceedings was supplied at the time of the addition of the Lords of Appeal to the House of Lords. One of the new Lords of Appeal had acquired in a Court, in which speed was considered rather than orderliness, the habit of interrupting the arguments by questions in the nature of "posers." On his reverting to this habit in the House of Lords, Lord Cairns interposed from the woolsack before the question could be answered, with the words, "I think the House is desirous of hearing the argument of counsel, and not of putting questions to him." The interposition was made by Cairns in a voice, not musical, like Cockburn's, but possessing, with his, the quality that it could not be gainsaid.

Cairns is said to have had no humour, but it was rather that he did not show it on the Bench, where he considered it out of place. On occasion he could use all the weapons of rhetoric in Parliament, and when anything

occurred to melt his cold impassive exterior, he showed that the true fire of the orator was within him, but usually repressed.

He appeared to inherit qualities both from Scotland, the land of his origin, and from Ireland, the land of his birth, but curiously mixed. Scotch impassiveness was deepened by an orange tinge of gloom; but it was redeemed by powers of imagination often sent us from the sister isle.

It is remarkable, but not unprecedented, that a man who succeeded so admirably as a speaker should have begun with a constitutional diffidence. So impressed was he with his deficiency in nerve, that at the beginning of his career at Lincoln's Inn he considered himself fit only for chamber practice, and actually for some time confined himself to conveyancing. Malins, in whose chambers he read, and who is said never to have quite forgiven his pupil for not making him a Lord Justice, probably disabused him of this want of confidence so far as to induce him to try his fortune at the Bar.

Certain it is that when he once had briefs

he was never without them ; for, as he himself described his early beginnings, he came from Trinity College to London without a friend. Mr. Gregory, of Bedford Row, gave him his first brief, and never afterwards deserted him. Cairns was one of the few judges not being Chief Justices who have taken a peerage while on the Bench ; but even his success at the Bar did not leave him rich enough to accept it, and he would have rejected it but for the fact that a rich relative came forward and endowed his peerage for him.

Cairns cannot be said to have been a popular Lord Chancellor. His manner was not sympathetic, and he was a sincere professor of a melancholy religion which he introduced even into his social entertainments. Like Lord Hatherley and his political rival, Lord Selborne, he taught in the Sunday school. He interested himself in benevolent projects, and sometimes took the chair at Exeter Hall. To hear Moody and Sankey was, he declared, the richest feast he could have. Perhaps his good nature was unduly trespassed upon on one occasion when an enterprising pro-

moter of a charity distributed circulars—particularly in the neighbourhood of Lincoln's Inn, the Temple, and Bedford Row—with the Lord Chancellor's autograph in the corner of the envelope and his crest on the seal. A conformity with Cairns's religious opinions became unfortunately acknowledged as the most direct route to preferment. Not to stay to prayers after a reception at Cairns's house was supposed to be fatal to the chances of the aspirant, and County Court judgeships, and even higher places, it was whispered, were the reward of persistent flattery of Cairns's religious demonstrations.

The only carnal weakness of which Lord Cairns has been accused was that he was "justly vain" of the spotlessness of his tie and bands in Court, and of the "nice conduct" of the flower in his button-hole, when in the attire, to use the words of his political chief, "which denotes festivity." During his first brief tenure of the woolsack in 1868, he appointed Giffard, Hayes, Brett, and Cleasby, as judges, the three last being created under a new Act with a view to election petitions;

and from 1874 to 1880 he appointed Archibald, Field, Lindley, Huddleston, Manisty, Hawkins, Lopes, Fry, Stephen, and Bowen. He also advised the Prime Minister in the appointment of Lords Justices Baggallay, Cotton, and Thesiger.

In taking part in the appointment of the promising son of Lord Chelmsford, whose services were too soon lost to the Bench, Cairns was able to some extent to heal the resentment caused by his having supplanted Lord Chelmsford in 1868, when Mr. Disraeli succeeded Lord Derby as Prime Minister. Lord Chelmsford was then reported to have said that he was dismissed in a manner in which a gentleman would not discharge his butler. *Punch* at the time endeavoured to soften the blow with the joke that Disraeli had erected "cairns" over Lord Chelmsford in honour of the ex-Chancellor. The sacrifice made to obtain Lord Cairns's services shows how highly they were esteemed by Mr. Disraeli. Cairns's portrait hung on the walls of Hughenden among Lord Beaconsfield's closest friends and supporters.

In one important branch of the duties of a Chancellor—namely, the nomination of County Court judges—Cairns did not show the happy inspiration of his party leader in the choice of his subordinates. Some of his appointments to the County Court Bench were much criticized, as such appointments are peculiarly liable to the illegitimate influences which were brought to bear on Cairns unconsciously to himself.

In another important branch of the duties of a Chancellor Cairns left his mark permanently on the legislation of the country. The only Act to which his name became actually attached was an Act allowing Chancery judges to give damages in lieu of an injunction or specific performance, which has met the fate of repeal by a Statute Law Revision Act. On a small scale it anticipated the Judicature Acts, a series of statutes in which Cairns had a very great share, having been chairman of the Judicature Commission, which reported in 1869, and Chancellor when the Acts first came into operation. The chief point in the Judicature Acts in which his influence was felt was

the restoration of the House of Lords as the final Court of Appeal, from which position it had been displaced by Lord Selborne's Judicature Act of 1873. In making this alteration, Cairns forgot to alter Lord Selborne's nomenclature, so that we have a Supreme Court of Judicature which is not a supreme, and a Court of Appeal which has another Appeal Court over it. Towards the close of his career Cairns returned to his first love, conveyancing, and passed through the House of Lords the Conveyancing Acts of 1881 and 1882, and the Settled Land Act of 1882, measures which in part he attempted to introduce in the House of Commons as early as 1858. When Cairns first became Chancellor in 1868, there were no less than five ex-Chancellors—namely, Lord Brougham, Lord St. Leonards, Lord Cranworth, Lord Westbury, and Lord Chelmsford, although Lord Brougham and Lord Cranworth died in that year. It happened that at his death there was not one ex-Chancellor, so that the necessity for the re-arrangement of the House of Lords as an appellate Court by the creation of Lords of Appeal which he carried

out was fully apparent. Probably Cairns was missed in public life more by Lord Selborne than by any one else. Frequently opposed at the Bar and in Parliament, associated together on the Judicature Commission and in other consultations for the reform of the law, and both men of earnest purpose, each had that perfect confidence in the other which is so desirable between political opponents in the public interest.

Cairns's greatness was that of the rock—cold, hard, and impenetrable. He does not inspire enthusiasm, but a purely intellectual interest. He was not only the greatest lawyer of his day, but one of the few lawyers who were almost equally great in political life. The respect which his political friends had for him was shown by the choice of him as leader of their party in the House of Lords, and but for his physical weakness and a want of pliancy of character, he might have been Prime Minister.

JESSEL.

1873–1883.

THE death of Jessel, Master of the Rolls, occurred at a moment when the public were beginning to obtain a true estimate of his powers; but lawyers alone fully knew his greatness. The popular appreciation of judges is generally built up of facts which but little influence the lawyer. If the judge has been in Parliament, a reflex of his Parliamentary reputation follows him to the Bench; but Jessel's Parliamentary career did not lay the foundation of a reputation. His genius was too purely intellectual, and contemptuous of weaker minds, to commend itself to the average member of the House of Commons; and he was persuasive by the force of his reasoning only.

Force of intellect, however, is the power which makes a reputation among lawyers. The strength of his intellectual qualities was the more conspicuous because its recognition was conceded, in spite of many faults of manner. There are many whose memory of Jessel is accompanied by some soreness. He did not spare any one who crossed swords with him in argument, whether his opponent was at the Bar or on the Bench. But his manner was due to no feeling but the desire to push home his conclusion.

It was well known at the Bar that, if a man had anything to say worth hearing, and said it in a few words, Jessel would be sure to listen to him, particularly if he were a young man. He would take pains to show the disputant the error of his ways, and he never passed unnoticed any objection to his decision which had any weight whatever. Within a few days of his death the Master of the Rolls seemed to have been conscious of the defect in his judicial manner. "Don't think I am against you," he said; "counsel, in arguing, sometimes think that I am much more against

them than I really am"—a confession which had after his death something pathetic in it.

There is no doubt that during his last days his irritation and impatience on the Bench increased to an alarming extent. He had, as a member of the Court of Appeal, expressed an opinion with even more than his usual confidence on a question of the right of parties to interrogate one another in an action to recover land. The House of Lords overruled this decision, and Jessel's impatience at the result was a sign of mental breaking up. "Don't cite to me the decisions of remote judges," he said at this time.

Jessel never wrote a judgment while he was on the Bench, and yet he seldom delivered one which did not deal with every point in the case; and sometimes, when he had clearly made up his mind as to some obscure legal topic or disputed Act of Parliament, he went out of his way to elucidate it. Unlike Hatherley, who followed the same practice, Jessel saved time and did not waste it by not writing judgments. He was able to decide on the spot without adjourning, and he was never diffuse or discursive, although always full.

The performance by Jessel of his daily work in the now abandoned Rolls Court in Chancery Lane was an exhibition of power seldom witnessed. The observer hardly knew which most to admire—his minute knowledge of case-law, the breadth of his acquaintance with legal principles, or the amazing rapidity with which he took in the facts of his cases. American visitors to London were generally taken to the Rolls to see the legal machine at work at its best and swiftest.

Jessel seemed to devour an affidavit as soon as it was put into his hand. There was a superstition that nature had physically endowed him above other men with the capacity of acquiring knowledge, and that he could read one line with one eye and the next line with the other. It is certain that hardly any subject came to the surface in his Court without his displaying a knowledge of it which astonished experts. Large drafts were made on these gifts in patent cases, and the Master of the Rolls was equally at home in mechanical complications and in chemical mysteries. He used to amuse his leisure at his country

house by the study of botany and cataloguing funguses.

Something has necessarily been said of his fault of manner on the Bench; but it lay merely in the manner. His mind was eminently judicial, and the most skilful advocate that practised before him probably never discovered that he had any prejudices by which he could be misled. Least of all had he any favour for those of his own race, although he was the first of his faith who attained the English Bench. On one occasion, when it appeared that a peculiarly hard bargain had been driven by a party in the case, the Master of the Rolls observed, "I fear this gentleman is of the Israelitish race." In spite of his birth, with the adaptiveness of his race, there was much of the solid John Bull about Jessel. He had the Englishman's love of individual liberty, and entered a protest against the extension of summary punishment for contempt of Court, which had become too common in his day. Occasionally he would illustrate his meaning by quotations from the New Testament.

There was no section of the community

which did not look to him for the most uncompromising justice. This was due to the belief, not only that he had a practical knowledge of most of the affairs of life, and was a learned lawyer, but that his mind was absolutely free from cant. His rapidity was so great, and his reputation so high, that the Rolls Court became during his reign the most important Court in the country.

When the Judicature Acts came into operation, the universality of Jessel's legal knowledge stood him in good stead. Here, at least, was one judge who could decide off-hand upon the limitations of a crabbed settlement at one moment, and at another expound the obscurities of a bill of lading.

Jessel's place in history will probably be connected with these Acts. The Common Law Procedure Acts failed to bring about a satisfactory compromise between law and equity. As Jessel was fond of pointing out, the common law judges had equitable powers given to them by those Acts which the Chancery judges did not possess. These powers, however, were ignored, and the

Judicature Acts became necessary. The same influences were at work in the passing of the Judicature Acts, and at an early date they showed themselves ominously. Jessel set himself the task of giving the most liberal operation to the principles of those Acts, and he effected far more for the fusion of law and equity than the Acts themselves. It is not too much to say that the success which the Judicature Acts obtained would have been impossible without him. His experience of equity and Chancery practice was vast, and he had not forgotten the common law which he had learned in the chambers of Barnes Peacock, one of the ablest pleaders of his day, and afterwards Chief Justice at Calcutta.

His theory of injunctions was so liberal that he considered himself at liberty to order or forbid anything so long as he acted according to legal principles. His interpretation of the position of the High Court as a "maid-of-all-work" in all its branches was so wide that he once offered to decree a judicial separation in an action between husband and wife on a deed. His view of the complete victory of equity

over law led him to the opinion that a lease was no longer necessary for any purpose so long as there was an agreement for a lease, and on one occasion by a simple injunction he settled in a few minutes the qualification of an alderman of Southampton, which could only have been done at common law by the tedious process of a *quo warranto.*

Jessel was not free from the faults to which great minds are liable. He was so quick that occasionally he was hasty, but the mistakes he made were not half so many as those of other judges who got through about a tenth of his work. He was also apt to be intellectually overbearing. He was fond of exposing the errors of others, but he never admitted a doubt of the correctness of his own opinion. His phrase, "Of course, all judges believe that they are right," has passed into a byword; and Jessel was the mental antipodes of Lord Eldon, great lawyers as both were.

History does not record that Jessel ever admitted he was wrong. When his attention was called to the fact that the Court of Appeal had overruled his decision, he said, "That is

strange; when I sit with them, they always agree with me." This was generally true, as there were few judges whom the Master of the Rolls could not carry with him. Whoever sat with him, the Court was generally considered to consist of the Master of the Rolls. He constantly overcame even the tenacity of colleagues like Brett and Bramwell, although often in the Committee-room of the House of Lords, where the Court of Appeal then sat, Jessel and Brett, sitting side by side, might be heard delivering themselves of long excursions on law and equity not to but at one another. Jessel was fond of insisting that many things startling to common-lawyers were everyday practice in Chancery, and it required some courage and persistence in his colleagues to make him admit that they were common forms only in the Master of the Rolls' own Court.

Some of his defects were perhaps due to his having, during most of his career at the Bar, practised before a very mild judge in the same Court in which he afterwards sat on the Bench. In spite of his education and association with persons of culture, Jessel never entirely lost

the peculiar twang which makes discord of the voices of many of his race. He also had a difficulty with that Shibboleth of polite English, the letter *h*. He did not always drop it, but he did sometimes, and he was conscious of his failing. He was, however, too careless of small matters to make any affectation about it. He appeared to drop the *h* or sound it just as at the moment he seemed inclined.

An odd story arises out of this habit of his. When at the Bar, he was cross-examining a French witness through an interpreter in a patent case, in regard to a certain chemical compound of a poisonous character. "If you 'eat it?" asked Jessel. "Si vous le mangez," echoed the interpreter. "Mangez!" said the witness, lifting up his hands in horror, "Mais, ce n'est pas pour manger." It was some time before Jessel could get on sufficiently good terms with the evasive letter to induce the interpreter to ask what would happen: "Si vous l'échauffez?"

His first appearance in the Court of Queen's Bench after his appointment as Solicitor-General was memorable. It was to oppose

a rule for a mandamus to the Commissioners of the Treasury to allow the county of Lancashire certain costs in criminal cases which had been disallowed. "The Court of Queen's Bench hasn't the power to do anything of the sort," said the Solicitor-General in peremptory tones; "it can't do it." The colour was seen gradually to rise in the face of Chief Justice Cockburn, and at last he spoke: "Whatever the Court of Queen's Bench can or cannot do, Mr. Solicitor, it is accustomed to be addressed with respect." The Solicitor waited until he had reached the end of the thread of argument which he had in hand, when he mentioned, in passing, that he really did not mean to be disrespectful. His acute and self-reliant genius when he was on the Bench chafed at the authority of cases decided by other judges, and he had an ingenious plan of eluding them by saying that he was not bound by the similarity of the case but only by the principle, and that there was no principle in them—a practice not conducive to the certainty of the law.

After two years as law officer, he was eight years a judge of first instance, when the office

which he filled was permanently added to the Court of Appeal. He died at the age of fifty-nine, and after little more than nine years' service on the Bench; but he will undoubtedly take a very high rank among the judges of England. Some judges have established a reputation for knowledge of real property, others for knowledge of commercial law, others for knowledge of equity; but there was hardly a branch of law in which Jessel did not distinguish himself, and he was thus the fit judicial representative of the reforms introduced by the Judicature Acts.

KARSLAKE.

1846–1881.

KARSLAKE was not a judge because his health gave way before he could reach the Bench, but he was Solicitor-General, Attorney-General, Privy Councillor, and the most prominent member of the Bar of his day. It was but by accident that he does not strictly come within the purview of these pages, and any account of the period in which he took part as a lawyer would be incomplete without the pathetic story of a man upon whom nature seemed to have heaped her best gifts only to make them useless by the infliction of blindness when the highest honours were within his grasp. Of tall figure and well-formed features, he was one of the few men whom a full-bottomed wig became. On Cir-

cuit he went by the title of "Handsome Jack," and was the rival of Coleridge, who was his contemporary in the fullest sense. They were born the same year, called to the Bar at the same Inn in the same year, began to practise at the Devon Sessions together, and were made Queen's Counsel the same year. They were on different sides in the same cases, and contested Exeter on opposite political principles. When one was Attorney-General, the other was ex-Attorney-General; and the unlikeness of Karslake fitted the unlikeness of Coleridge.

Karslake's father, of a Devonshire family, was a solicitor in Regent Street, and he inherited legal blood from his mother, who was the daughter of the famous conveyancer, Richard Preston. Preston was the author of "Preston on Abstracts," and in his day was the absolute arbiter of all questions of real property and of wills. Karslake, the father, was for some time secretary to the Duke of Kent, after whom he called one of his sons, and he was not a rich man. Preston, who lived in days when real property lawyers made

money, undertook to educate the boys, and John was sent to Harrow. Kent was sent also to Oxford, and it was always a grievance that John was not sent too. Both went to the law. Kent was celebrated in the Equity Courts for his apt quotations from Horace, and for his jokes, and became a Queen's Counsel and Member of Parliament. At one time it was thought possible that the two brothers might have been law officers of the Crown together. John was reserved for still higher honours.

Karslake, although very successful as an advocate, was not an orator. He impressed by his fine manly bearing, deep voice, and simple force, his knowledge of men and his strong sense, and not by any polish in his language or any subtlety of thought or expression. His literary relaxation was the study of poetry, of which his mind had a great store. Although born at Croydon, there was a touch of Devonian breadth in his pronunciation of English which, like the suspicion of provincialism in Mr. Gladstone's tones, added to the effect.

Coleridge, whose style and tactics were the very opposite of Karslake's, found him his most formidable opponent. A manner like Karslake's was best adapted to sweep away the cobwebs of a subtle argument, especially when a jury were the judges.

There was a little of the dandy about Karslake, without any trace of effeminacy. On one occasion when, as counsel, he had to take part in a "view" on a wet day, he astonished all present by the elaborate character of the boots and gaiters which were brought for him.

The career of Karslake was an example of great success broken off in its midst, which we must go back to the time of Sir William Follett, another Devonshire man, to parallel. Karslake's life since 1876, when he retired from active work, had a melancholy interest for the profession of which he was so long an ornament. His loss of sight was a blow which is great enough in itself, but under which men have often managed to live cheerfully and even usefully. For some time this was Karslake's case. He was frequently to

be seen in the Temple, he would repeat the grace in the hall of his Inn, and was fond of gathering round him a knot of friends whom he would amuse out of his fund of anecdote.

A good story is told of him on one of these occasions. Although no longer in office, Karslake was habitually consulted by Cairns in regard to men at the Bar who applied to him for appointments and whom Karslake was likely to know. Cairns's secretary arrived at Karslake's chambers one afternoon when he was surrounded by his friends and in the middle of a tale. "The Chancellor wants to know what you think of Bateson of the Western Circuit," asked the secretary. "Bateson," said Karslake; "why, he was the cleverest man I ever knew. I'll tell you why presently; but let me finish this story first." He finished the story, and then turning in the direction of his new visitor, said, "Now, Graham, I will tell you why I think Bateson the cleverest man I ever knew." But the secretary was gone. "Well," said Karslake, "I will tell you fellows

the reason, because it is rather a good story. The fact is that Bateson was the only man who ever robbed me of a fee. That is why I call him the cleverest man I ever knew." Thereupon he proceeded to relate how Bateson had been an attorney on his Circuit, how he had owed Karslake fees, and how by some ingenious shift he had avoided paying them. Meanwhile the Chancellor's secretary, who was a busy man and could not wait to hear stories, posted off to the Chancellor and reported that it was all right about Bateson. Karslake had said that he was the cleverest man he ever knew. So the lucky Bateson was made a County Court Judge, and to this day does not know that he owes his place to the neglect of a Chancellor's secretary to wait for the end of a story.

It gradually became apparent that Karslake's loss of sight was only a symptom of general failure. He became less and less himself, both physically and intellectually, and the news of his death, five years after his retirement, was received without surprise.

His popularity with the Bar and solicitors

was probably greater than that of any Attorney-General of the generation, and was due to his total absence of affectation or assumption, and his genuine kindliness in manner and act. At one time it was expected, with considerable confidence, that he would be the successor of Chief Baron Kelly, believed to be willing to make way for him, in which case the Western Circuit, already represented by two Chief Justices, would have had a third chief on the Bench—an honour which it is now impossible for any Circuit to claim. But Kelly was not amenable, so that Karslake did not even obtain the name of a judge. It is best perhaps that his memory should linger among us as a simple barrister, of which character he was in the opinion of many an ideal representative.

Karslake in his palmy days at the Bar made a great deal of money, and left £200,000 when he died, which he divided equally among his brothers and sisters.

BENJAMIN.

1866–1883

BENJAMIN was not a judge through the accident of his birth and adventurous history. Lord Coleridge wished that he should be made a judge, but the powers that were at that time overruled the suggestion. The last waves of the tempest aroused by the war of North and South in America had then hardly subsided, and probably it was thought best not to risk offence by raising to the English Bench a man who had taken a prominent political part on the losing side. In May, 1880, while stepping out of a tram-car in Paris, Benjamin had a fall, from the effects of which he never fully recovered; and there was no doubt of the wisdom of the decision of a man in his seventy-second year to retire

while he could, in view of the opinion of his physicians that his state of health had taken a turn requiring rest and freedom from excitement. If he could in his retirement have been persuaded to give to the world some account of a life full of interest and adventure, a natural curiosity would have been gratified; but this was a task from which a nature like Benjamin's shrank. He had a horror of any approach to brooding on the past, and made a practice of periodically destroying all his old letters and papers. In his seclusion he found himself unable to do much work to his book on "Sale," which was eventually published under new editors, and fifteen months from his retirement Benjamin died. He viewed his approaching death with the equanimity of a philosopher. The wasting nature of his disorder enabled him to know very closely how many weeks and days he would live, but he maintained his habitual cheerfulness, and his last days were gratified by the magnificent reception of him given in the Inner Temple Hall in June, 1883. Having then taken leave of the English Bar, he re-

turned to Paris, where his wife and daughter lived, and died in the house in the Avenue de Jena, which he had built and furnished at great cost.

Benjamin's parents were British subjects of Jewish extraction, who some time within the first ten years of the century emigrated from England, settling at first in the island of St. Croix in the West Indies, where Judah Philip Benjamin was born. This island, originally French, had become Danish; but in 1811, when Benjamin was born, was British, reverting in 1814 to Denmark. Benjamin was, therefore, both a native-born British subject and an Englishman by descent, and this status was recognized when he was called to the Bar in England.

The assertion of rights over British subjects for whom this country insisted on searching on board the ships of other nations had led to the war then carried on with the United States, on the cessation of which the Benjamin family passed to the continent of America and settled at Wilmington, North Carolina. The son became a student at Yale College, and at the

age of twenty-one entered the legal profession at New Orleans. Benjamin's professional successes in America, as in England, began with the production of a book which was a codification of a branch of the law of Louisiana, and they culminated in his being sent to Washington as a senator for that state.

A story told of him at this period illustrates Benjamin's gentleness of disposition, and at the same time the absence of conventionality in manners in the United States at that date. Benjamin did his best to introduce a more friendly personal feeling than existed among politicians of opposite views by giving entertainments to which partisans of various shades were invited. An invitation to dinner was sent to Andrew Johnson, afterwards President of the United States on the death of Lincoln, among others, but no answer was received. Benjamin and Andrew Johnson happened to meet, when Benjamin asked whether his invited guest was coming. Johnson appeared to have no notion that any answer was expected of him, and said that perhaps he was coming and perhaps he was not—an

answer which Benjamin was forgiving or politic enough not to resent.

About this time occurred an event which might have turned Benjamin's history in altogether a different direction; that is, an offer by President Pierce to Benjamin of a judgeship in the Supreme Court of the United States. The effect which the acceptance of this offer might have had on subsequent events might be made the subject of curious speculation. On the one hand, the war between North and South might have ended much more quickly; and, on the other, the legal literature of the United States might have been enriched by some masterly judgments, while the English Bar would have been poorer.

Benjamin did not accept the offer; and it is matter of general history that when the Southern States seceded from the Union one by one he declared to stand by his state of Louisiana, in a speech which Sir George Cornewall Lewis said "could not have been better done by our Benjamin," and that he became Mr. Jefferson Davis's Attorney-General,

Minister for War, and Secretary of State successively.

Upon the surrender of General Lee, Benjamin's life was in danger; and after many hardships and hairbreadth escapes, he managed, in an open boat, to reach one of the "sponge-islands" off the coast of Florida. Thence he reached Nassau, New Providence, where he was under British protection, and whence he started for England in an English steamer, with all the security with which the recent Slidell and Mason incident afforded.

On January 13, 1866, Benjamin was admitted a student of Lincoln's Inn, and in Trinity Term of the same year, after six months' probation, was, by special grace, called to the Bar. As an example of the accumulation of misfortunes, it is remarkable that all his available capital at this time was locked up in Overend, Gurney, and Co.; but at this period he was frequently a contributor to the London press, and his friends in America did him the service of buying his library, which had been confiscated with the rest of his property, and sending it to him.

It was characteristic of Benjamin that even at this low point in his fortunes, he did not allow himself to be under-estimated. One day, as he sat in his chambers in Lamb Building, the boy who served as his clerk entered his room with a load of papers almost as big as himself. A cheque for the modest sum of five guineas came with them, and on it was the name of a well-known firm of solicitors whom it was important for Benjamin to conciliate. The papers lay on Benjamin's table for some days, when a clerk called and took them away. Soon after he returned, and told Benjamin that there must be some mistake, as the tape had not even been untied. "There is no mistake," said Benjamin; "the fee sent covered taking in the papers, but not reading them." The clerk returned discomfited to his principal, who went to see Benjamin himself, and set matters right with a further five and twenty guineas. Afterwards, when Benjamin was better known, this same solicitor reminded him of the case, and said that it was a point of American and English law upon which his clients insisted on having

Benjamin's opinion. "If you had told me that at the time," said Benjamin, "I should not have looked at those papers for twice the fee."

He chose the Northern Circuit, and at Liverpool found that, from the relations between the solicitors of that port with their brethren in New Orleans, he was not without some introduction to business. In August, 1868, he brought out his book on "Sale," and his reputation increased so rapidly that he gradually withdrew himself from Nisi Prius, which class of practice was less congenial to him than the argument of questions of law, and reserved himself for business in Banco.

His admission within the Bar was probably a little postponed out of deference to the susceptibilities of the Government of the United States; but he was made a Queen's Counsel of the County Palatine of Lancaster, with a patent of precedence dating from July 29, 1872, and afterwards a full Queen's Counsel. In April, 1875, he was made a bencher of Lincoln's Inn, and for the last four years confined his practice ordinarily to the House of

Lords, the Judicial Committee of the Privy Council, and the Court of Appeal.

Benjamin was not possessed of any graces of manner or appearance. He was a short, round man, with a strong American accent, pronouncing "jury" as if it were "jewery." His one good feature was a fine pair of brown eyes, and in speaking he had a way of taking off his spectacles and pointing his arguments with them in his hand, putting them on again if he had to read. Benjamin owed his success to his great knowledge of legal principles and his extraordinary powers as a dialectician. Fabulous statements were made as to his forensic earnings; but all that can be said with certainty is that, for several years before his retirement, his professional income for the year ran to five figures.

No doubt his fees were large, and on one occasion Benjamin opened the eyes of a client who wished for a consultation at his private residence by saying quietly, "Very well; but my fee is three hundred guineas"—a prohibitive tariff, with which it would be well if leading lawyers generally fenced their hours of ease.

Several reasons have been assigned why he was not offered a judgeship in England. Some have already been given; but it is enough to say that when he was young enough for the office he was too young a member of the English Bar, and when he had been called long enough he was rather too old in years. Between his retirement and his death a Canadian suitor offered him two thousand guineas to advocate his cause in the Judicial Committee of the Privy Council; but Benjamin was not to be tempted.

It is to the credit of the English Bar that his rapid progress excited no jealousy. The simplicity of Benjamin's manners, his entire freedom from assumption, and his kindness of heart endeared him to his professional brethren.

He seldom went into society, and dined almost invariably at the table by the fire in the Junior Athenæum Club, smoking his cigar afterwards in the billiard-room. In the Vacation he always went to France, and was fond of spending the summer in the Pyrenees. His great powers made a profound impression upon

the solicitors who were his clients. On one occasion, a solicitor apologized for leaving, as part of Benjamin's instructions, a document in Spanish, and said that he would send a translation next day. "Don't trouble yourself to do so," said the counsel; "I read Spanish." "Well, Mr. Benjamin," said the client, "what don't you know?"

In return for what he received from the Bar, Benjamin identified himself with its interests, and no counsel was more fearless in his assertion of the right to a patient hearing which of late years had been rather encroached upon by a fondness for the Socratic method on the Bench.

At the end of the session of 1881, Benjamin was arguing a case in the House of Lords, with Lord Selborne presiding. The learned counsel very early in his argument formulated, after his manner, the propositions of law for which he was about to contend. One of these, when put in its bare form not supported by the substructure of reasoning which Benjamin could make to look so solid and compact, nor illustrated by example after example from his

rich imagination, drew from Lord Chancellor Selborne the word "Nonsense!" Benjamin stopped short, slowly put his papers together, tied the tape round them, made a low bow, and left the bar of the House. His junior had immediately to fill the breach; but before he had proceeded far in his argument, the Lord Chancellor said that he was sorry that Mr. Benjamin had left the House, and he was afraid he was the cause of it in saying what he ought not to have said. This incident happened shortly before Lord Selborne found it necessary, through indisposition, to abstain for a time from the labours of his office.

Benjamin appointed two members of the English Bar his executors, and left £60,000 personalty and his valuable house in Paris equally to his wife and daughter. He was one of the few lawyers who made their own wills successfully. His will was entirely in his own handwriting, and conscious of his own rather mixed nationality, he took care that it should be in accordance with both English and French law. Knowing from experience how difficult the proof of domicile sometimes is, he

took occasion, as if casually, to introduce into his will the statement that he meant to live the remainder of his life in France. The question arose whether the will ought not first to be proved in France; but, under a statute which he no doubt had in view, the will of a British subject domiciled abroad may be proved in England without any proceeding in the foreign country. Thus he was all his life a British subject, had been a senator of the United States and the Confederate Attorney-General, became domiciled in England, and died a domiciled Frenchman.

The success of Benjamin at the English Bar is without parallel in professional annals. There can be nowhere else an example of a lawyer coming from his own to a foreign country, and in fourteen years reaching the highest places at the Bar which he has adopted. In fact, the lawyers of the United States and of England are thoroughly at home with one another. The converse case to that of Benjamin might happen at any time, if the necessary circumstances existed. No English lawyer of the same qualifications as Benjamin

has settled in the United States; but members of the English Bar have, on many occasions, appeared before the Law Courts in the United States for English clients, and have always been received with the greatest cordiality, and been given the privileges of the Bar without a moment's question. Benjamin was received in England not as a Southerner, or in any other character than as a man of intellect, well qualified to practise the law in this country; and, as such, he succeeded as he deserved to succeed.

PHILLIMORE.

1867–1883.

THE era with which we are dealing is one of disappearances of legal institutions, and amongst them we must count the civilian lawyer. He has been disestablished, though not disendowed, both proctor and advocate, for when his privilege of monopoly in certain Courts was taken away he was allowed ample compensation. In fact, he was given as much as he asked, the Government taking each man at his own estimate of profits, and so saving the trouble of investigation, to the chagrin of those who looked for a reward for modesty in their figures, and to the perpetuation of the experience that others take men at their own valuation.

Doctors' Commons, in St. Paul's Churchyard —a name execrated on the seaboard of the

continent during the French wars, as a "devil from whose clutches there was no escaping"—never so ancient or so distinguished an institution as any one of the Inns of Court, has become some time part of the ordinary brick and mortar of the City of London, and Sir Robert Phillimore was the last of the judges of the High Court of Admiralty, and of the purely civilian lawyers on the Bench.

Phillimore was made of a material of which judges are seldom made. He had neither the worldly wisdom, the natural shrewdness, the combativeness, or the intellectual powers, each of which may bring a man to the Bench. But he had in the first place the great requisite of belonging to a family which was within the clique of civilian lawyers. His father, Dr. Joseph Phillimore, was Regius Professor of Civil Law at Oxford, a chancellor of three dioceses, a member of Parliament, and the editor of reports in the Ecclesiastical Courts from 1809–1821. His sons were men of some distinction. The ablest of them was undoubtedly the eldest, John George Phillimore, Q.C., in whom the force of the family

appears to have been concentrated, but who, from that very reason, did not attain much success in the Civilian Courts. He married a daughter of Lord Justice Knight-Bruce, was the first lecturer on constitutional law at the Inns of Court, and used bitterly to inveigh against the injustices of his profession. The close connection of the profession and the family in the Civilian Courts was touchingly illustrated by the dedication of Phillimore's "Ecclesiastical Law" to the son of the author.

The second son, Robert, was educated at Wesminster, and in due course took a second class in classics at Oxford. He was admitted an advocate and called to the Bar, and in his turn became official to two archdeaconries, and chancellor to three dioceses. He proved himself a fluent speaker in Court, was industrious, and amassed a great amount of legal information. He covered nearly the whole ground of the practice of his Court in two books, one on ecclesiastical, and the other on international law. Both of them have much good matter in them, but are not highly reputed for exposition. A high Churchman,

but with a strong faith in Liberal principles, and a close personal friend of Mr. Gladstone, he entered Parliament as member for Tavistock, and carried a useful Act for the introduction of the *vivâ voce* examination of witnesses in the Ecclesiastical Courts, although this Act was the beginning of the end of the disestablishment of his cloth. As soon as evidence began to be taken as in the Common Law Courts, a demand arose for lawyers possessing the powers of advocacy and of cross-examination, and the monopoly was doomed.

He obtained his share also of the Admiralty side of civilian practice, and became Judge of the Cinque Ports and Admiralty Advocate. On Dr. Lushington retiring, he was made Judge of the High Court of Admiralty, and Official of the Archbishop of Canterbury, or Dean of the Arches.

As Dean of the Arches he was frequently before the public, at a time when the struggle between the two extreme parties in the Church was at its height, and the public became used to the spectacle of Sir Robert Phillimore deciding in favour of high ritual, and the

Judicial Committee overruling him. He supported his son, Dr. Walter Phillimore, who, as Chancellor of Lincoln, had declined to order a clergyman to admit into his churchyard a tombstone inscribed to the memory of the daughter of "the Rev. Henry Keet," who was a Wesleyan minister; but the Judicial Committee were unable to find any reason for Church of England clergymen monopolizing the title of Reverend. In *Jenkins* v. *Cook*, he decided that a Bristol gentleman who had an expurgated edition of the Bible in his house for family use, and would not state that he believed in the devil, must be excluded from the sacrament as an open and notorious evil liver, and again the Judicial Committee disagreed with him, as in several other cases. The redeeming merit of his judgments was that they were expressed in good English, and his manner in hearing cases left nothing to be desired in point of courtesy and patience.

When the Judicature Acts were passed, Phillimore had to take his share of divorce cases, and perhaps his most remarkable appearance on the Bench was when, as Judge of the

Admiralty Court, he sat as a member of the Court for the Consideration of Crown Cases Reserved on the question whether manslaughter, punishable in an English Court, could be committed by a foreign ship negligently running down a British ship within three miles of our shore.

The civilian lawyers were distinguished, with notable exceptions like Lord Stowell, rather by learning than capacity, by subtlety in argument rather than depth of insight, For the future, the law which they practised will less and less possess a special class of practitioner devoted to it alone, but will be taken up as occasion requires by the ordinary practitioner who may have turned his attention in that direction. This is not a subject of regret, as special lawyers and special Courts have a tendency to narrowness; and it would be a step in the right direction if the Probate, Divorce, and Admiralty Divisions were merged in the Queen's Bench, or, at all events, if divorce were distributed in turn among the Queen's Bench judges, or certain of them to be chosen like the election judges.

Phillimore represented the transition period between the old school and the new. His name will be remembered at once as the last of the Admiralty judges and as the introducer of the modern system of trial in ecclesiastical causes. His retirement from the Bench was somewhat overshadowed by the fact that on the morning of the day on which he took leave of the Bar—Wednesday, March 21, 1883—Sir George Jessel died, but the high estimation in which he was held by his brother-judges and the legal profession generally found full expression from the mouth of the Attorney-General on that occasion.

WATKIN WILLIAMS.

1880–1884.

THE sudden and early death of Mr. Justice Williams cut short a judicial career of much promise, and left little more to relate than the history of a lawyer who succeeded to the highest ambition of English lawyers—that is, the Bench—by perseverance, talent, and the full use of his opportunities. As in the case of many other successful lawyers, the law was not the first profession of Mr. Watkin Williams. There is often a Rosaline before there is a Juliet, and in his case it was medicine and not law to which he first devoted himself. He duly passed the examinations for his diploma at University College Hospital, and for some time was house-surgeon.

Whether the knowledge thus acquired was of use to him on the Bench is a question upon

which there may be a difference of opinion. Experts in a science like medicine consider it better that a judge should have no more knowledge of the science about which they give evidence than that possessed by a man of ordinary education. If he knows more he is apt to form an opinion based upon his own imperfect knowledge instead of carefully weighing the opinions on both sides. It is also a little interesting to remark that, although Mr. Justice Williams's medical advisers informed him some months before his death that he suffered from an aneurism of the aorta, he would not believe it. After his short rest in the spring, he professed never to have felt better in his life, and his sanguine temperament put aside the positive opinion of his doctors and the warnings which his own knowledge must have conveyed.

Scientific knowledge, however, which may be a doubtful advantage on the Bench, may be most useful at the Bar; and, in cases of compensation for personal injuries, Mr. Williams found an acquaintance with anatomy stand him in good stead. It was a long time, however,

before he had the opportunity to test his capabilities. Being the son of a Denbighshire parson and without interest, he made progress at first purely by dint of "devilling." He used to attribute the start he thus obtained to the advice of the late Mr. Macnamara, who told him to be at Westminster and Guildhall every morning punctually at half-past nine, and be ready to "hold" any briefs which might be thrown in his way by learned friends overburdened with work. He followed this advice to the letter, and gradually began to get briefs of his own. His time out of Court he devoted to a little book called "An Introduction to the Practice and Pleading in the Superior Courts of Law," which was published two years after his call, and which, although not an ambitious work, served to show that he was acquainted with the mysteries of the Common Law Procedure Acts.

His marriage, first, with a niece of Mr. Malins, afterwards Vice-Chancellor, and secondly, with the daughter of Mr. Justice Lush, in the year when that learned judge was elevated to the Bench, helped, no doubt,

to bring him into prominence, and his connection with a member of a City firm of solicitors directed his practice into the lucrative channels of commercial law.

Meanwhile he very early attained a seat in Parliament, which lawyers look upon as a veritable flight of steps in the professional ladder, and which Welsh lawyers have special facilities in obtaining. His genial, open manner recommended him to his constituents, and probably that part of his career which had the least drawback was his twelve years' connection with the Denbigh boroughs as Member of Parliament. After five years in Parliament he ventured to take silk, and managed to maintain his forward progress. At the general election in 1880 he was returned for Carnarvonshire, but in November was offered and accepted a judgeship.

An incident of his elevation to the Bench supplies the key to much of his character. At that time, the abolition of the office of Chief Justice of the Common Pleas and Chief Baron was much discussed, and on the elevation of Mr. Justice Lush to the Court of Appeal, and

its being rumoured that his son-in-law would succeed him, Mr. Watkin Williams wrote to his constituents and declared that he never would accept an "ordinary judgeship." Much capital was made out of this unlucky phrase. Verses were written with the refrain, "I will not be an ordinary judge," and Westminster Hall was in convulsions of laughter at the incident, which was pronounced "just like Watkin." However, Williams thought better of it, probably after a calm consultation with his father-in-law. He accepted the ordinary judgeship, and attended the council of judges which met shortly after his appointment to consider the abolition of the Common Pleas and Exchequer Divisions, and of their respective chiefs. Mr. Justice Williams submitted a paper in which he advocated the abolition of the divisions, but the retention of the chiefships, and which he sent to the newspapers.

Early in the following year, upon the elevation of Mr. Justice Mathew to the Bench, Justices Williams and Mathew sat for some time as a Divisional Court in one of the Committee Rooms of the House of Lords. This

Court at the time went by the name of the Tribunal of Commerce, and the rapidity with which Mr. Justice Williams made up his mind, and his familiarity with the doctrines of mercantile law, were conspicuous.

Upon the question of prisoners' statements Williams again illustrated the impulsiveness of his nature. After the decision of the judges, in November, 1881, was announced, he wrote to the newspapers practically declining to be bound by it, and declaring that "nothing short of an Act of Parliament will ever induce me to deprive a prisoner of his right" of making a statement to the jury of facts not proved in evidence.

In his mode of trying prisoners he was exceedingly fair to the accused, and once, when asked whether those whom he tried appeared to have any general characteristics, he replied, "They are just like other people; in fact, I often think that, but for different opportunities and other accidents, the prisoner and I might very well be in one another's places."

In the ordinary course of business at Nisi

Prius his quickness of apprehension and that knowledge of law which is acquired by experience made him a very efficient judge. If he formed an opinion rather hastily and expressed it, he would candidly withdraw it on discovering his mistake.

His judgments upon new or complicated points of law were not so satisfactory, his style being somewhat diffuse and his reasoning wanting in closeness. A judge who was on the Bench less than four years cannot be expected to have added much to the literature of the law, and Williams, whether from accident or because he sat frequently at Nisi Prius, contributed rather less than his proportion.

His nature had too much enthusiasm in it for the cold impartiality of the Bench. Doubtless in this respect he would have improved by experience and under a conscientious desire to keep his natural impulsiveness in check. As things are, his name will recall rather the successful lawyer and politician than the judge who left any mark on English law.

LONDON:
PRINTED BY WILLIAM CLOWES AND SONS, LIMITED,
STAMFORD STREET AND CHARING CROSS.

00023968

Digitized with financial assistance from the
Government of Maharashtra
on 18 July, 2018